No. 87-996-CFX
Status: GRANTED

Title: Coit Independence Joint Venture, Petitioner
v.
Federal Savings and Loan Insurance Corporation, as Receiver of FirstSouth, F.A.

Docketed:
December 14, 1987

Court: United States Court of Appeals for the Fifth Circuit

See also:
87-255
87-451
87-452

Counsel for petitioner: Goodfriend,Robert E.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 14 1987	G	Petition for writ of certiorari filed.
4	Jan 19 1988		Order extending time to file response to petition until February 16, 1988.
2	Jan 20 1988		DISTRIBUTED. February 19, 1988
5	Feb 16 1988		Memorandum of respondent filed.
6	Feb 17 1988		REDISTRIBUTED. March 4, 1988
8	Feb 29 1988		REDISTRIBUTED. March 4, 1988
9	Mar 7 1988		Petition GRANTED.
			**********
12	Mar 19 1988		Order extending time to file brief of petitioner on the merits until May 5, 1988.
10	Mar 21 1988		Record filed.
		*	Certified copy of original record and C. A. proceedings,3 volumes, received.
13	May 3 1988		Brief amicus curiae of Joseph M. Hudspeth filed.
14	May 4 1988		Joint appendix filed.
15	May 4 1988		Brief of petitioner Coit Independence Joint Venture filed.
16	May 5 1988		Brief amici curiae of George S. Watson, et al. filed.
17	May 5 1988		Brief amicus curiae of United States League of Savings Institutions filed.
18	May 17 1988	D	Motion of Joseph M. Hudspeth for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
20	May 19 1988	D	Motion of United States League of Savings Institutions for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
19	May 31 1988		Motion of Joseph M. Hudspeth for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
21	May 31 1988		Motion of United States League of Savings Institutions for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
23	May 31 1988		Order extending time to file brief of respondent on the merits until June 17, 1988.
24	Jun 17 1988		Brief of respondent FSLIC filed.
25	Jun 17 1988		Brief amicus curiae of National Council of Savings Institutions filed.
27	Jun 17 1988	G	Motion of Federal Home Loan Bank of Dallas, et al. for leave to file a brief as amici curiae filed.

No. 87-996-CFX

Entry	Date	Note	Proceedings and Orders
26	Jun 21 1988		Lodging received.
28	Jun 28 1988		Opposition of petitioner to motion of Federal Home Loan Bank of Dallas, et al. for leave to file a brief as amici curiae filed.
33	Jun 29 1988		Reply of the Federal Home Loan Bank of Dallas, et al. to petitioners' objection to motion for leave to file brief as amici curiae.
29	Jul 2 1988	G	Application (A88-16) by Petitioner to file a petition in excess of page limits, submitted to Justice White.
31	Jul 2 1988	G	Application (A88-17) filed by petitioner, for an extension of time within which to file a reply brief, submitted to Justice White.
30	Jul 12 1988		Application (A88-16) granted by Justice White, allowing a maximum of 27 pages.
32	Jul 12 1988		Application (A88-17) granted by Justice White extending the time to file until July 31, 1988.
34	Aug 1 1988		Reply brief of petitioner Coit Independence Jt. Ven. filed.
35	Aug 10 1988		CIRCULATED.
36	Aug 29 1988		Set for argument. Tuesday, November 1, 1988. (1st case) (1 hr).
37	Sep 15 1988		Motion of Federal Home Loan Bank of Dallas, et al. for leave to file a brief as amici curiae GRANTED.
38	Nov 1 1988		ARGUED.
39	Nov 1 1988		Letter from petitioner received and circulated.
40	Nov 8 1988		Letter from petitioner received and distributed.

87-996

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

v.

THE FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION,
AS RECEIVER OF FIRSTSOUTH, F.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether Congress has granted FSLIC, as receiver, the exclusive authority to adjudicate the validity of state law causes of action asserted against failed savings and loan associations under a FSLIC receivership, as to which the courts of appeals are in conflict?

II. If Congress did give FSLIC authority to adjudicate state law causes of action asserted against failed savings and loan associations under a FSLIC receivership, would that grant of authority violate the mandate of separation of powers in Article III, § 1 of the United States Constitution?

III. Does requiring a creditor to submit its state law claims against a failed savings and loan association under a FSLIC receivership to FSLIC for adjudication deny such creditor due process of law under the Fifth Amendment to the United States Constitution?

IV. Does requiring a creditor to submit its state law claims against a failed savings and loan association under a FSLIC receivership to FSLIC for adjudication deprive such creditor of its right to a jury trial under the Seventh Amendment to the United States Constitution?

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COIT INDEPENDENCE JOINT VENTURE,

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v.

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF FIRSTSOUTH, F.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Coit Independence Joint Venture respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on October 16, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported, and is reprinted in the appendix hereto, p. A-1, *infra*. The opinion ("Order") of the U.S. District Court has not been reported, and is reprinted in the appendix hereto, p. A-5, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1987. (Appendix at A-8, *infra*.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution

Article III, Section 1 of the United States Constitution
The Fifth Amendment to the United States Constitution
The Seventh Amendment to the United States Constitution

Statutes

12 U.S.C. § 1464(d)(6)(C)
12 U.S.C. § 1728(c)
12 U.S.C. § 1729(c)
12 U.S.C. § 1729(d)
12 U.S.C. § 1730(k)(1)

Regulations

12 C.F.R. § 549.4
12 C.F.R. § 569a.8

The text of the foregoing provisions, statutes and regulations is reprinted in the appendix hereto, p. A-21, *infra*.

STATEMENT OF THE CASE

A. Statement of Facts

From 1983 to 1986, petitioner Coit Independence Joint Venture ("Petitioner") received several loans and engaged in other dealings with FirstSouth, F.A., a federal savings association ("FirstSouth"). Petitioner and FirstSouth fell out, and

on or about October 24, 1986, Petitioner brought an action against FirstSouth in the 95th Judicial District Court of Dallas County, Texas. Petitioner alleged that FirstSouth had charged Petitioner usurious interest on loans under Texas law, and that FirstSouth had breached its fiduciary duty and its implied duty of good faith and fair dealing in connection with the loans to Petitioner. For a more complete statement of the nature of Petitioner's claims against FirstSouth, see Plaintiff's Original Petition, reprinted in the appendix hereto, p. A-9, *infra*.

B. Proceedings in the Courts Below

On or about December 4, 1986, the Federal Home Loan Bank Board ("FHLBB") appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") receiver for First-South pursuant to 12 U.S.C. § 1464(d)(6)(A) and 12 U.S.C. § 1464(d)(6)(B)(i), on the ground, *inter alia*, that First-South's liabilities exceeded its assets. On December 31, 1986, FSLIC removed Petitioner's state court action to the United States District Court for the Northern District of Texas, pursuant to 12 U.S.C. § 1730(k)(1)(C) and 28 U.S.C. § 1441. The United States District Court had original jurisdiction of this action under 12 U.S.C. § 1730(k)(1)(C) and 28 U.S.C. §§ 1331 and 1346.

On February 19, 1987, FSLIC moved the United States District Court to dismiss Petitioner's complaint, arguing that FSLIC had exclusive jurisdiction to adjudicate any and all causes of action against FirstSouth. FSLIC insisted that the federal district court had no jurisdiction to hear claims brought against FirstSouth, but that the sole recourse of a would-be litigant against an insolvent savings and loan association under a FSLIC receivership was to take its claim to FSLIC for initial adjudication, then to appeal that decision to the FHLBB, and finally to appeal the FHLBB's decision to

the federal courts pursuant to the appeal procedures dictated by the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (the "APA"). The district court granted FSLIC's motion to dismiss and entered an order on February 25, 1987, dismissing Petitioner's action. (Appendix, p. A-5, *infra*). Thereafter, Petitioner filed a motion to reconsider; such motion was denied by order of the district court dated April 9, 1987. (Appendix, p. A-7, *infra*). Plaintiff appealed from these orders under 28 U.S.C. § 1291 to the United States Court of Appeals for the Fifth Circuit. The court of appeals affirmed the dismissal by the district court after denying Petitioner's request for an initial hearing *en banc*.

In its appeal, Petitioner argued that the Fifth Circuit's prior decision in *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985) ("Hudspeth") was erroneous in its conclusion that certain statutes and regulations governing the authority of FSLIC to act as receiver granted FSLIC exclusive jurisdiction over all claims against a failed savings and loan association. In addition, Petitioner argued that the critical statutory language upon which the Fifth Circuit had relied in *Hudspeth* had materially changed. Finally, Petitioner claimed that FSLIC's asserted jurisdiction was unconstitutional. The court of appeals summarily determined, after denying Petitioner's request for an initial hearing *en banc*, that it was bound by its prior decision in *Hudspeth*, that the change in statutory language was immaterial, and that Petitioner's constitutional claims were not ripe for resolution at this time.

REASONS FOR GRANTING THE WRIT

I. This Petition Raises Issues of Exceptional Importance.

This is a case of national importance. At stake is the proper judicial treatment to be given literally billions of dollars of

creditor claims against failed savings and loan associations, and the constitutional rights of those creditors.[1] To date, thousands of creditors have been deprived of any meaningful judicial redress because of the actions of FSLIC and the erroneous court of appeals decision in *Hudspeth*.

According to a recent GAO report entitled, Thrift Industry: The Treasury/Federal Home Loan Bank Board Plan for FSLIC Recapitalization (March 1987), there were, as of September 1986, some 445 thrifts nationwide operating under FSLIC's insurance guarantee that were insolvent. *See also* The Bond Buyer, March 6, 1987, at 5; Los Angeles Times, May 11, 1987, part 4, at 2, col. 3. Furthermore, FSLIC has stated in its petition for rehearing in *Morrison-Knudsen Co. v. CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1987) ("*Morrison-Knudsen*") (currently Petition for Writ of Certiorari, No. 87-451) that "in those states within the Ninth Circuit alone, there currently are 36 Bank Board appointed FSLIC receiverships" and "in those 36 receiverships 1,385 creditor claims aggregating $6,990,551,251 are either pending or resolved." (Federal Savings and Loan Insurance Corporation's Petition for Rehearing and Suggestion of Appropriateness of

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[1] There are currently two other petitions for writs of certiorari before this Court on similar issues: *Magd E. Zohdi, Quality Contracting and Services, Inc., et al. v. FSLIC as Receiver of Sun Belt Federal Bank, F.S.B.*, No. 87-255, filed August 5, 1987, and *FSLIC as Receiver for Westside Federal Savings and Loan Association v. Stevenson Associates, et al.*, No. 87-451, filed September 17, 1987. The Solicitor General has acquiesced in the petition for a writ of certiorari in *Zohdi*, No. 87-255, but this petition raises several issues, including constitutional issues of due process and right to trial by jury, which are not raised by the two other petitions. Accordingly, this petition should be included in any grant of certiorari on the issue of the scope of FSLIC's adjudicatory power as receiver.

Rehearing En Banc, p. 3.) FSLIC also states in its petition for rehearing in *Morrison-Knudsen* that "it is inevitable that the number of receiverships and creditor claims will increase." *Id.* Accordingly, there are approximately 38 creditors for each thrift institution in receivership within the Ninth Circuit alone.

While Petitioner does not know the number of thrifts actually in receivership nationwide, it is obvious that with 445 thrifts in an insolvent condition as of September 1986, the rights of thousands of creditors are or potentially will be affected by any decision that forces creditor claims to be decided administratively rather than by the courts. Furthermore, if the Fifth Circuit's position as expressed in this case is incorrect, then adjudication of creditor claims in administrative hearings before FSLIC and the FHLBB will be a waste of FSLIC's administrative resources because creditors will, in the absence of a definitive ruling from this Court, continue to challenge FSLIC's jurisdiction to hear creditor claims and such claims may have to be reheard in the courts. This is not due to any hostility to administrative proceedings, as such, but to a deeply held conviction that FSLIC is not and cannot be impartial, to the belief that Congress never granted FSLIC adjudicatory authority over creditor claims, and to the conviction that it is unconstitutional to delegate the trial of private state law claims to a federal administrative tribunal. The potential waste of judicial and administrative resources that will result from any delay in resolving the issue of the scope of FSLIC's adjudicatory power is thus very substantial. The issues presented by this petition therefore go well beyond the rights of the parties to this case, and affect the administrative/judicial process and the constitutional rights of many other similarly situated persons nationwide.

II. The Fifth Circuit's Determination that Congress Has Granted FSLIC, as Receiver, the Exclusive Authority to Adjudicate the Validity of State Law Claims Against Failed Savings and Loan Associations under a FSLIC Receivership is in Direct Conflict with a Decision of the Ninth Circuit Court of Appeals.

The Fifth Circuit, in affirming the dismissal by the district court of Petitioner's state law claims against FirstSouth for lack of subject matter jurisdiction, stated that it was bound by its prior decision in *Hudspeth*. In *Hudspeth*, the Fifth Circuit interpreted federal statutes and regulations as granting FSLIC the exclusive power to adjudicate all causes of action by creditors against failed savings and loan associations under a FSLIC receivership, subject only to judicial review under a deferential standard of the APA.[2] This interpretation was expressly rejected by the Ninth Circuit in *Morrison-Knudsen*. Both courts have acknowledged the direct conflict. *Morrison-Knudsen*, 811 F.2d at 1212; Appendix at A-2.

A. Section 1464(d)(6)(C)

The first of the two statutes relied upon by the Fifth Circuit in *Hudspeth* was 12 U.S.C. § 1464(d)(6)(C), which provides in relevant part:

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[2] What standard of review under the APA would apply appears to be unsettled. *Compare, Morrison-Knudsen*, 811 F.2d at 1222 (arbitrary and capricious standard) *with Lyons Savings & Loan Association v. Westside Bancorporation, Inc.*, 636 F. Supp. 576, 580 (N.D. Ill. 1986) (weight of the evidence standard); *see* Appendix at A-4, n.3.

> Except as otherwise provided in this subsection, no court may . . . except at the instance of the [FHLBB], restrain or affect the exercise of powers or functions of a conservator or receiver.

The Fifth Circuit opined that judicial adjudication of "even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets" because "FSLIC would not be able to determine how much to pay other claimants until the termination of parallel litigation." *Hudspeth*, 756 F.2d at 1102. Thus, the court decided, judicial adjudication would "restrain or affect" FSLIC's receivership function in violation of this provision.[3]

The Ninth Circuit rejected the Fifth Circuit's construction of Section 1464(d)(6)(C). First, the Fifth Circuit's conclusion that judicial resolution of even the facial merits of claims would delay, and thus "restrain or affect," FSLIC's receivership functions in contravention of Section 1464(d)(6)(C), was rejected because it failed to explain how judicial review

[3] Petitioner argued in its appeal to the Fifth Circuit that Section 1464(d)(6)(C) was a species of *anti-injunction statute* designed to prevent interference with the functions of a receiver by means of *coercive judicial decrees*. It was *not* designed to prevent judicial resolution of *damage* actions. The Fifth Circuit was in error in assuming that judicial adjudication would delay the liquidation of assets and thus "restrain or affect" FSLIC's receivership functions in violation of Section 1464(d)(6)(C). To the contrary, judicial adjudication would in no way hinder such liquidation: FSLIC would be free to proceed with distribution of assets, but would remain liable to any creditors whose claims were wrongly denied, as does the FDIC. *See, First Empire Bank v. FDIC*, 572 F.2d 1361, 1371 (9th Cir. 1978); Note, *Creditors' Remedies Against the FDIC as Receiver of a Failed National Bank*, 64 Tex. L. Rev. 1429, 1438 (1986).

under the APA, which the Fifth Circuit would allow, would *not* cause such restraint or effect. *Morrison-Knudsen*, 811 F.2d at 1216. Moreover, the Ninth Circuit pointed out that Section 1464(d)(6)(C) is not an affirmative grant of power, but only a negative prohibition, and thus cannot provide a basis for FSLIC's claim of adjudicatory authority. *Morrison-Knudsen*, 811 F.2d at 1217. Furthermore, the court stated that ordinarily the functions of a receiver do not include adjudication. The Ninth Circuit concluded that judicial adjudication does not restrain or affect a receivership, but "simply determines the existence and amount of claims that a receiver is to honor in its eventual distribution of assets." *Id.*

B. Section 1729(d)

The Fifth Circuit also relied upon 12 U.S.C. § 1729(d), which provides in relevant part:

> In connection with the liquidation of insured institutions, [FSLIC] shall have power . . . to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board . . . .

Based upon the grant of power in Section 1729(d) to FSLIC to "settle, compromise, or release claims" against the insolvent thrift and to "do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board," the Fifth Circuit concluded that Congress had intended to totally divest the courts of the power to adjudicate, in the first

instance, creditor claims against failed thrifts under a FSLIC receivership.[4]

The Ninth Circuit also rejected the Fifth Circuit's interpretation of Section 1729(d). Rather than implying Congressional intent to grant FSLIC extraordinary adjudicatory powers, the Ninth Circuit noted that the power to "compromise, settle, or release" claims is actually incompatible with the power to adjudicate: settlement and compromise "strongly suggest the presence of the power of the other party to take the dispute to court." *Morrison-Knudsen*, 811 F.2d at 1219.[5]

C. Board Regulations

The Fifth Circuit's conclusion in *Hudspeth* was "fortified by the existence of FHLBB regulations setting forth procedures for FSLIC payment of creditor claims," by which FSLIC, after giving notice, is authorized to disallow claims "not proven to its satisfaction." *Hudspeth*, 756 F.2d at 1102-03, citing 12 C.F.R. §§ 569a.8 and 549.4.

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[4] The critical language of § 1729(d) had significantly changed prior to the time Petitioner filed suit, and prior to the time that FirstSouth was placed in receivership. The Fifth Circuit incorrectly disregarded this material change, as more fully described in Part III, *infra*.

[5] Petitioner also argued that the Fifth Circuit's construction of Section 1729(d) was inconsistent with its own statutory interpretation. The language of Section 1729(d), that FSLIC has power to settle, compromise, or release claims "subject only to the regulation of the [FHLBB]," under the Fifth Circuit's literal interpretation, would preclude not only *initial* adjudication by the courts, but judicial review by the courts of FSLIC's determination as well. Yet, the Fifth Circuit would allow judicial review under the APA, thus contradicting its own position.

The Ninth Circuit was not persuaded by such FHLBB regulations. While 12 C.F.R. §§ 569a.8 and 549.4 permit FSLIC to pay or refuse to pay a particular claim, the Ninth Circuit found that they do not empower FSLIC to adjudicate the merits of those claims, but only to determine "*whether a dispute exists*. It does not empower FSLIC to *resolve the dispute with the force of law*." *Morrison-Knudsen*, 811 F.2d at 1218 (emphasis in original). Rather, the court found FSLIC's authority under the FHLBB regulations to be analogous to that of an insurance company, which may disallow claims not proven to its satisfaction, but its decision may thereafter be challenged in court. *Id.*[6]

D. Other Provisions Contradicting the Fifth Circuit Position

The Ninth Circuit also focused upon other provisions directly contradicting the Fifth Circuit's conclusions in *Hudspeth*. First, the court noted that, when Congress intended FSLIC to act as adjudicator of federal law violations, the agency procedures for such adjudication were carefully delineated in the statutes and regulations. *Morrison-Knudsen*, 811 F.2d at 1219-20. No such analogous delineations were enacted regarding FSLIC's handling of creditors' claims. The Ninth Circuit found the inference "irresistible" that "had Congress any intention of permitting FSLIC to adjudicate in

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[6] Petitioner also challenged the Fifth Circuit's interpretation of FHLBB regulations, which grant FSLIC authority to approve claims "proved to its satisfaction" and to disallow claims "not so proved" on the grounds that the regulations did not contain an appropriate standard for the adjudication of the merits of a claim. Such regulations cannot imply the power to adjudicate because the requirement that claims be proven to FSLIC's "satisfaction" is entirely subjective, and as such is contrary to the objective standards associated with an impartial adjudication.

its capacity as receiver, similar provisions . . . would have been enacted." *Id.* at 1220.

Second, the Ninth Circuit was persuaded by 12 U.S.C. § 1728(c), a statute of limitation regarding depositors' claims against FSLIC. While the court recognized that this statute technically applies only to depositors' claims, it clearly anticipates judicial adjudication in the event of a disputed claim: the logical inference being that FSLIC may adjudicate neither depositors' nor creditors' claims. *Morrison-Knudsen*, 811 F.2d at 1220. "To assume that FSLIC must litigate *depositors*' claims, with which it has great expertise, but may adjudicate *creditors*' claims . . . as to which its expertise is much less, is not a rational interpretation of the statutory scheme." *Id.*

The Ninth Circuit found further support for its position in 12 U.S.C. § 1730(k)(1). That statute expressly includes, within the suits against state-chartered institutions which FSLIC must defend against in state courts, an action against FSLIC "in its capacity as . . . receiver . . . which involves only the rights . . . of . . . creditors." *Id.* After noting that there was no indication that Congress intended to treat state-chartered and federally-chartered institutions differently in this regard, the Ninth Circuit concluded that "Congress clearly expected creditors' suits against FSLIC as receiver to be heard and adjudicated in court." *Morrison-Knudsen*, 811 F.2d at 1221. The court found further support for its conclusion in the fact that the FDIC, although granted analogous powers by Congress, had never asserted, in its long history of litigating creditor claims, the exclusive power to adjudicate those claims. *Id.*

Finally, in dicta, the Ninth Circuit noted the "serious constitutional difficulties that attend FSLIC's assertion of adjudicatory jurisdiction" under Article III, Section 1 of the

U.S. Constitution and *Northern Pipeline Construction Co.v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), as private causes of action would thus be adjudicated by a non-Article III agency. The court decided that it was unnecessary to pass on these matters, as it "reject(ed) FSLIC's interpretation because it raises these 'serious' constitutional difficulties, which the statute can quite 'fairly be read' to avoid." *Morrison-Knudsen*, 811 F.2d at 1222, citing *Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3252 (1986).

A review of *Hudspeth* and *Morrison-Knudsen* indicates that a direct and irreconcilable conflict exists between the Fifth and the Ninth Circuits on the same matter of federal law.

III. The Fifth Circuit Incorrectly Decided Petitioner's Appeal.

A. Statutory Arguments

The Fifth Circuit never addressed the merits of Petitioner's arguments against its statutory interpretation. Instead, the court simply declared itself bound by *Hudspeth* after denying Petitioner's request for an initial hearing *en banc*.

Furthermore, the court incorrectly dismissed Petitioner's point that the critical language of Section 1729(d) had materially changed prior to Petitioner's suit, and prior to First-South being placed in receivership. The statute in *Hudspeth* read: "[FSLIC] shall have power . . . to settle, compromise, or release claims . . . against the insured institutions, and to do all other things that may be necessary in connection therewith, *subject only to the regulation of the [FHLBB]*." (Emphasis added). On October 13, 1986, the language changed to read: "subject only to the regulation of the *court* or other public authority having jurisdiction over the matter." (Emphasis added). The Fifth Circuit disregarded this change as

immaterial based upon 12 U.S.C. § 1729(c)(3)(B), which states:

> In connection with the liquidation of any such institution, the language "the court or other public authority having jurisdiction over the matter" in subsection (d) of this section shall mean said [Federal Home Loan Bank] Board.

The court's reliance upon this section was misplaced because the reference therein to "any such institution" is expressly limited by 12 U.S.C. § 1729(c)(1) to institutions "*other than a federal* savings and loan association . . ." (Emphasis added). Accordingly, Section 1729(c)(3)(B) has no application to Petitioner's claims in this case, because First-South is a *federally* chartered savings association. Thus, contrary to the Fifth Circuit's assertion, there has been a material change in the statutory scheme since *Hudspeth* was decided.

B. Ripeness

Petitioner argued that the Fifth Circuit's interpretation of FSLIC's statutory authority to adjudicate creditor claims would render the applicable statutes unconstitutional. Petitioner argued that the grant of exclusive authority to FSLIC to adjudicate Petitioner's state law claims would violate the doctrine of separation of powers required by Article III, Section 1 of the Constitution, Petitioner's Fifth Amendment right to due process, and Petitioner's Seventh Amendment right to a trial by jury. These points were also avoided by the Fifth Circuit, which found Petitioner's constitutional claims "not ripe for resolution at this time. The FSLIC may allow all or more of (Petitioner's) claims, depriving Petitioner of standing and a grievance." (Appendix at A-4.)

This determination was incorrect for three reasons. First, Petitioner's constitutional claims directly challenge the constitutional legitimacy of subjecting Petitioner to any administrative adjudication by FSLIC. Under such circumstances, the ripeness doctrine does not apply. As this Court stated in *Public Utilities Commission v. United States*, 355 U.S. 534, 539-40 (1958):

> If . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued. But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.

Thus, because the determination of a challenge to the constitutionality of statutes is peculiarly within the province of the courts, Petitioner has an immediate right to have that issue determined before it is subjected to an unconstitutional administrative procedure.

Second, Petitioner demonstrated that imminent harm would be caused by subjecting its claims to FSLIC's asserted jurisdiction. The presumption that FSLIC might grant Petitioner its requested relief was belied by the fact that FSLIC had already stated its position in its brief in the Fifth Circuit that Petitioner's claims are barred under the "*D'Oench, Duhme* doctrine" because the proof of such claims was not memorialized in Respondent's books and records. See Appellee's Brief in the Fifth Circuit at 37-38. Furthermore, during the pendency of this case in the Fifth Circuit, FSLIC posted

Petitioner's property for foreclosure, to Petitioner's injury. (Appendix at A-18.)[7]

Finally, another panel of the Fifth Circuit held only three weeks after the decision in this case that it *would* review a constitutional challenge to FSLIC's assertion of exclusive jurisdiction over creditor claims in light of this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) and the Ninth Circuit's decision in *Morrison-Knudsen. See Thomes v. Equitable Savings and Loan Association*, 831 F.2d 558 (5th Cir. 1987). The panel's decision in the *Thomes* case is directly contrary to the panel's decision in the instant case on the ripeness issue.

Thus, Petitioner's constitutional claims were and are ripe for decision, and the Fifth Circuit's methodical sidestepping of Petitioner's arguments on appeal was unjustified. Those constitutional claims were and are as follows.

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[7] The Fifth Circuit's reliance in the instant case upon *Poe v. Ullman*, 367 U.S. 497 (1961) was misplaced. In *Poe*, this Court denied the plaintiffs' request for a declaratory judgment that a Connecticut law prohibiting the use of contraceptives was unconstitutional, because the plaintiffs could not show the requisite likelihood of immediate harm. The statute which the plaintiffs sought to challenge had been on Connecticut's books since 1879, and had been applied only once in over 80 years in a test case to determine the statute's constitutionality. Furthermore, this Court noted that contraceptives were openly sold in drugstores throughout Connecticut, without prosecution. *Id.* at 1755. The unlikelihood of the *Poe* plaintiffs' injury was absolutely clear, and no meaningful analogy can be found between the facts of that case and this one.

C. Constitutional Arguments

1. *Separation of Powers*

The Fifth Circuit's position, that FSLIC has exclusive jurisdiction to adjudicate Petitioner's claims against FirstSouth, violates the doctrine of separation of powers required by Article III, Section 1 of the Constitution, (hereinafter "Article III"). This problem was recognized by the Ninth Circuit in *Morrison-Knudsen*, and provided the basis of Justice Akin's decision in *Glen Ridge I Condominiums, Ltd. v. FSLIC*, No. 05-85-00873-CV (Tex. App. — Dallas, December 30, 1986), in which the Fifth Circuit's position was rejected.

Adjudicatory power, normally vested in Article III courts, may only be delegated to non-Article III tribunals in narrowly-circumscribed areas. *In Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), this Court found unconstitutional a grant of broad and exclusive adjudicatory power to bankruptcy judges, analogous to the power claimed by FSLIC in this case. This Court held that the attempted delegation of power to non-Article III courts, to adjudicate private rights, i.e., common law and statutory claims arising between private litigants, violated Article III. *Id.* at 68-70. *Compare Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) (delegation to non-Article III tribunal of power to adjudicate public rights, i.e. those created by Congress, held not unconstitutional) *and Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986) (delegation to non-Article III tribunal of jurisdiction over narrow class of claims, concurrent with that of district courts, and with claimants' consent, held not unconstitutional).

Here, the Fifth Circuit has upheld what it has interpreted to be a grant of *exclusive* power to adjudicate a limitless class of claims, which include common law claims arising between

private litigants. If the Fifth Circuit has correctly construed Congressional intent in this context, such an intended grant of adjudicatory power is clearly violative of *Marathon* and Article III.

2. *Due Process*

The due process clause of the Fifth Amendment to the U.S. Constitution entitles parties in criminal and civil cases to an impartial and disinterested tribunal. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The Fifth Circuit's position, which would require Petitioner to submit its claims to FSLIC for adjudication, would violate due process, because FSLIC is not an impartial and disinterested tribunal.

This Court has held that it denies due process to require a litigant to have his rights adjudicated by an official who "perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial." *Ward v. Monroeville*, 409 U.S. 57, 60 (1972), citing *Tumey v. Ohio*, 273 U.S. 510, 534 (1927) (mayor of city could not be regarded as impartial judge where he or city received pecuniary benefit from fines, forfeitures, or other fees imposed by him in his position as judge).

As the adjudicator of Petitioner's claims against FirstSouth, FSLIC would likewise occupy "two practically and seriously inconsistent positions." *Ward*, 409 U.S. at 60. As liquidating receiver for FirstSouth's assets, FSLIC must promptly reimburse FirstSouth's depositors from FSLIC's insurance fund, and then satisfy the claims of FirstSouth's nondepositor creditors to the extent that FirstSouth's assets allow. FSLIC thus "becomes both the holder of the claimed assets and, because subrogated to the reimbursed depositors' rights, the *single largest claimant against such assets.*" *Morrison-Knudsen*, 811 F.2d at 1215-16 (emphasis added). It is formulaic that

FSLIC's insurance fund, which is "currently under an unprecedented strain," *id.*, at 1216, can best be maintained if fewer third-party claims against the receivership estate are successful. Furthermore, the Fifth Circuit's ruling that Petitioner would suffer no harm by presenting its claims initially to FSLIC ignores the fact that FSLIC, in its capacity as receiver for FirstSouth, threatened Petitioner with foreclosure and thereafter posted Petitioner's properties for sale while Petitioner's case was pending in the Fifth Circuit. (*See* Appendix at A-18). Petitioner is denied due process when it is forced to present its claims to an administrative tribunal that is acting as both adversary and judge at one and the same time.

Because FSLIC's enabling legislation, as construed by the Fifth Circuit, requires Petitioner to submit its claims against FirstSouth to a tribunal so clearly interested in denying or minimizing Petitioner's recovery, that legislation violates Petitioner's due process rights.[8]

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[8] The Fifth Circuit's reliance on *Woods v. Federal Home Loan Bank Board*, 826 F.2d 1400, 1411 (5th Cir. 1987) in connection with Petitioner's due process argument is wholly misplaced. In *Woods*, a savings and loan association attacked the FHLBB's appointment of FSLIC as a receiver over its assets without a post-deprivation evidentiary hearing. *Woods* involved the sufficiency of the hearing procedures adopted by Congress for the appointment of a receiver over a regulated entity and had nothing to do with a challenge to the impartiality of FSLIC in its capacity as an adjudicator of private claims. Thus, the issue involved in this case of whether FSLIC is sufficiently impartial to act in an adjudicatory capacity to decide claims filed against savings and loan associations by unregulated third-party claimants was in no way involved in the *Woods* case.

3. *Right to Trial by Jury*

The Fifth Circuit's position also violates Petitioner's right to a trial by jury as guaranteed by the Seventh Amendment to the U.S. Constitution. This Court has held that the Seventh Amendment applies to claims for damages (like Petitioner's herein) which are based upon statutes and the common law. *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

Although this Court has created limited exceptions to the right to jury trial, those exceptions do not apply here. One exception is for claims involving "public rights," defined as rights "arising between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," generally including such areas as taxation, commerce, and immigration. *Marathon*, 458 U.S. at 67-68, 70. The right to jury trial remains inviolate, however, as to "[w]holly private tort, contract, and property cases" such as Petitioner's claims. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 458 (1977).

Another exception is for actions "against the United States." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). In determining whether a lawsuit is against the United States, this Court has held that substance, not form, controls: "The identity of the named parties defendant is not controlling; the dispositive inquiry is, 'who will pay the judgment?' " *Stafford v. Briggs*, 444 U.S. 527, 542 and n. 10 (1980). The "most availing inquiry" in determining whether a suit has been brought against the United States is whether "the judgment sought would expend itself on the public treasury or domain. . . . Where recovery can be had from funds in the possession and control of the agency and not from the United States Treasury, the United States is not involved in the suit." *FSLIC v. Williams*, 599 F. Supp. 1184, 1203 (D. Md. 1984).

Any argument that Petitioner in this lawsuit has brought an action "against the government" ignores the substance and glorifies the mere form of the suit. Petitioner brought this suit not against FSLIC for any wrongful act committed by FSLIC in its capacity as insurer or receiver, but against FirstSouth. Petitioner here asserts legal rights based on a dispute between Petitioner and FirstSouth, a private entity, which rights vested *independently of and prior to* FSLIC's assumption of receivership power over FirstSouth. Petitioner faces FSLIC as a defendant solely because FSLIC substituted itself in the lawsuit in place of FirstSouth. Unlike suits "against the government," this suit will not result in any recovery from funds of the United States Treasury. Until such time as the receivership assets of FirstSouth are distributed, Petitioner will recover, if at all, from those receivership assets. Even after FirstSouth's assets are distributed, however, a judgment may be awarded against the insurance funds in FSLIC's possession and control without affecting funds in the public treasury. *FSLIC v. Williams*, 599 F. Supp. at 1203-04. Because Petitioner's suit is not against the government, Petitioner is entitled to a jury trial.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1987

APPENDIX

COIT INDEPENDENCE JOINT VENTURE,

Plaintiff-Appellant,

v.

FIRSTSOUTH, F.A.,

Defendant-Appellee.

No. 87-1218

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Oct. 16, 1987.

Appeals from the United States District Court for the Northern District of Texas.

Before POLITZ, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Coit Independence Joint Venture appeals the dismissal, for lack of subject matter jurisdiction, of a suit against a savings and loan association in federal receivership. We affirm.

I. BACKGROUND

From 1983 to 1986, the Coit Independence Joint Venture received several loans and engaged in other dealings with FirstSouth, a federal savings association. Coit and FirstSouth fell out, and Coit sued FirstSouth in Texas court in October 1986, for usury, breach of fiduciary duty, and breach of the duty of good faith and fair dealing. In December 1986, the Federal Home Loan Bank Board (FHLBB) declared FirstSouth insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver. The FSLIC removed the case to federal court. In February 1987, the

district court dismissed the suit for lack of subject matter jurisdiction. The district court held that, under federal banking statutes, suits by creditors against the FSLIC as receiver must be presented first to the FSLIC, then appealed to the FHLBB, and only then appealed to the federal courts under the Administrative Procedure Act. 5 U.S.C. §§ 551 *et seq.* Coit appeals this dismissal.

II. DISCUSSION

Coit argues, first, that Congress did not intend the FSLIC to enjoy exclusive jurisdiction over creditors' state-law claims against savings associations under FSLIC receivership. Two courts have accepted Coit's statutory interpretation. *Glen Ridge Condominiums, Ltd. v. Federal Savings and Loan Insurance Corp.*, 734 S.W.2d 374 (Tex.App. — Dallas, 1986); *Morrison-Knudsen Co., Inc. v. CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1987). However, as Coit acknowledges, this Court has held that the statutes do give the FSLIC exclusive jurisdiction over suits brought by creditors against receiverships. *Northern Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986) (interpreting 12 U.S.C. §§ 1464(d)(6)(C) and 1729(d)). We have reaffirmed the *Hudspeth* decision several times, and are clearly bound by it.[1] *Federal Savings and Loan Insurance Corp. v. Bonfanti*, 826 F.2d 1391 (5th Cir. 1987); *Goodwin v. Federal Savings and Loan Insurance Corp.*, 806 F.2d 1290, 1292 (5th Cir. 1987); *Chupik Corp. v. Federal Savings and Loan Insurance Corp.*, 790 F.2d 1269 (5th Cir. 1986).

[1] Coit, recognizing that *Hudspeth* controls and that one panel may not overrule another panel, has petitioned for initial en banc hearing of this case. No member of this Court has indicated support for this motion, and it has been denied.

Coit points out that one of the statutory provisions relied on in *Hudspeth* has since been changed. The statute in *Hudspeth* read: "[T]he [FSLIC] shall have power . . . to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of *the Federal Home Loan Bank Board* . . . ." 12 U.S.C. § 1729(d) (emphasis added), cited in *Hudspeth*, 756 F.2d at 1101. On October 13, 1986, the language changed to read: ". . . subject only to the regulation of *the court or other public authority having jurisdiction over the matter.*" *Id.* (emphasis added). However, this Court has subsequently reaffirmed the FSLIC's exclusive jurisdiction. *Bonfanti*, at 1393. Moreover, the statute itself says:

> In connection with the liquidation of any such institution, the language "the court or other public authority having jurisdiction over the matter" in subsection (d) of this section shall mean said [Federal Home Loan Bank] Board.

12 U.S.C. § 1729(c)(3)(B).[2] Hence, the change in statutory language will not support overruling *Hudspeth*.

Coit argues that the statute, when interpreted to grant the FSLIC exclusive jurisdiction, violates the Constitution in several ways. First, Coit contends that its suit, as a common-law suit arising between private parties, must be heard by an article III court. Second, Coit claims that sending the dispute to an administrative body violates due process in that the FSLIC will act as both party and judge and in that any administrative determination will be reviewed under the

[2] This language was deleted in 1982 and reinstated effective October 13, 1986. 12 U.S.C.A. § 1729 (West 1987 Supp.).

lenient "substantial evidence" standard.[3] Third, Coit argues that administrative adjudication would deprive it of the right to trial by jury.

This Court has recently held that administrative review of FSLIC receivership actions affords due process. *Woods v. Federal Home Loan Bank Board*, 826 F.2d 1400, 1411 (5th Cir. 1987). Coit's other constitutional arguments have not been directly addressed by our cases. However, the arguments are not ripe for resolution at this time. The FSLIC may allow all or more of Coit's claims, depriving Coit of standing and a grievance. The Supreme Court has held that a party seeking to overturn legislation as unconstitutional must be "immediately harmed, or immediately threatened with harm" by the application of the statute. *Poe v. Ullman*, 367 U.S. 497, 505, 81 S.Ct. 1752, 1756, 6 L.Ed.2d 989 (1961). Coit does not meet this test.

In sum, Coit's statutory arguments are foreclosed by binding precedents of this Court. Coit's constitutional arguments, to the extent that they were not implicitly resolved by the precedents, are not yet ripe for resolution. Accordingly, the district court's dismissal is AFFIRMED.

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[3] Interestingly, the FSLIC states in its brief, "FSLIC has no authority to issue binding orders or final judgment against Coit." Appellee's Brief at 41 n. 8. The effect of a FSLIC/FHLBB determination and the standard of review to which such determinations will be subject are apparently unsettled. *Compare Lyons Savings and Loan Ass'n v. Westside Bancorporation, Inc.*, 636 F.Supp. 576, 580 (N.D.Ill.1986) (quoting legislative history indicating that Congress assumed that the courts would review FSLIC decisions using the more stringent "weight of the evidence" standard) *with Morrison-Knudsen Co.*, 811 F.2d at 1222 (absent explicit congressional direction, appellants would be reduced to seeking reversal under the "arbitrary and capricious" standard).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE,

Plaintiff,

v.

FIRSTSOUTH, F.A.,

Defendant.

CA 3-86-3185-R

ORDER

In *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 106 S.Ct. 790 (1986), the Fifth Circuit held that the FSLIC has the exclusive power to determine *all* claims — including those raised in litigation — against the FSLIC, as receiver for a savings and loan association. This Court, as it must, followed *Hudspeth* in *Glen Ridge I Condominiums v. FSLIC*, CA 3-85-1709-R (N.D. Tex. Sept. 27, 1985), and Judge Fish did the same in *Zervas v. Falkner*, CA 3-84-0238-G (N.D. Tex. Sept. 30, 1985).

The FSLIC has been appointed as receiver for Firstsouth. Accordingly, the Motion of the FSLIC to Dismiss the Plaintiff's Complaint is GRANTED.[1]

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[1] This order is being entered *before* the expiration of the twenty (20) day period for the plaintiff's response — in an attempt to save expense and attorneys fees for the plaintiff in filing a needless response — since any attempt to obtain a reversal of *Hudspeth* must be addressed to the Fifth Circuit. However, if the plaitniff [sic] does wish to file a reply to the motion to dismiss, the reply will be treated as a motion for reconsideration of this Order.

SIGNED this 25th ay of February, 1987.

s/JERRY BUCHMEYER
United States District Judge
JERRY BUCHMEYER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE,
Plaintiff,
v.
FIRSTSOUTH, F.A.,
Defendant.
} CA 3-86-3185-R

ORDER

Plaintiff Coit Independence Joint Venture moves this Court to Reconsider and Vacate Its Order of February 25, 1987 dismissing this action, and to Remand this action to state court. Upon consideration of the Motions, the Responses thereto, and all relevant authority, this Court is of the opinion that both of Plaintiff's Motions should be denied; it is therefore

ORDERED that Plaintiff's Motion to Reconsider and Vacate and its Motion to Remand shall be and hereby are DENIED, and it is further

ORDERED that the Court's Order of February 25, 1987 dismissing this action shall not be disturbed.

Signed this 9th day of April, 1987.

/s/JERRY BUCHMEYER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1218
Summary Calendar

D.C. Docket No. CA-3-86-3185-R

COIT INDEPENDENCE JOINT VENTURE,
Plaintiff-Appellant,

versus

FIRSTSOUTH, F.A.,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas.

Before POLITZ, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

October 16, 1987

ISSUED AS MANDATE: Nov. 9, 1987

OP-JDT-10C
Rev. 4/85

NO. 86-14274

COIT INDEPENDENCE JOINT VENTURE, *Plaintiff,* vs. FIRSTSOUTH, F.A., *Defendant.*	In the District Court of Dallas County, Texas 95th Judicial District

PLAINTIFF'S ORIGINAL PETITION

Coit Independence Joint Venture, Plaintiff, files this its Original Petition complaining of FirstSouth, F.A. ("FirstSouth"), Defendant, and as grounds therefor would show the following:

PARTIES

1. Plaintiff is a joint venture organized and existing in accordance with the laws of the State of Texas with its place of business in Dallas County, Texas.

2. Defendant FirstSouth is a federal association organized and existing under the laws of the United States. The principal place of business of FirstSouth is in Pine Bluff, Arkansas. FirstSouth has done business and is doing business in the State of Texas by entering into contracts with Texas residents which are performable in whole or in part in the State of Texas. FirstSouth has not designated an agent upon whom service may be made and therefore may be served by serving the Secretary of State of Texas to be forwarded to the President of FirstSouth, William Bruton, at the address of FirstSouth's principal place of business at Post Office Box 900, Pine Bluff, Arkansas 71611.

BACKGROUND

3. In May of 1983, Plaintiff was assigned the right to purchase from the trustees of E Systems, Inc. Pool Trust, approximately 1,000 acres of land (the "Rasor tract") for approximately $20 million. The closing of the purchase of the Rasor tract was scheduled for June 1, 1983. During April and May of 1983, various entities approached representatives of Plaintiff inquiring about purchasing the Rasor tract from Plaintiff after the June 1, 1983 closing. After various meetings and discussions, an oral agreement in principle to sell the property was reached between Plaintiff and Sterling-Coit, Ltd. The agreement in principle was reduced to a written contract of sale and signed on May 26, 1983 between Plaintiff and Sterling-Coit to sell the Rasor tract at a profit of approximately $10 million. That sale was scheduled to close within seventy-five days of the date of the contract and did in fact close on August 12, 1983 when the Rasor tract was sold at a profit of approximately $10 million.

4. During March and April of 1983, Plaintiff was also seeking financing to purchase the Rasor tract for the scheduled closing of June 1, 1983. Plaintiff spoke with various lenders, and in early April of 1983, Plaintiff was put in touch with Defendant FirstSouth and one of its officers, Joel Cheatham. In seeking financing for the property, Plaintiff's representatives advised FirstSouth that there was little or no risk in loaning the money to purchase the property for the reason that Plaintiff had verbal commitments from a potential purchaser to buy the property at an approximate $10 million profit. Defendant FirstSouth, upon learning that Plaintiff would be selling the property for an approximate $10 million profit in a very short period of time, advised Plaintiff that it would be willing to loan to Plaintiff up to an aggregate amount of $31 million if Plaintiff agreed to pay to Defendant

not only the calculated interest rate at the treasury bill rate plus 4.25% but, as additional compensation for the use of the funds, a 25% "profit participation" interest and a "loan origination fee" or "commitment fee" in the approximate amount of $310,000, approximately $100,000 of which was refunded upon funding of the loan. The basic agreement between the parties is evidenced by the April 13, 1983 commitment letter, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference.

5. Thereafter, on June 1, 1983, Defendant loaned to Plaintiff the approximate amount of $20 million under the terms of the Promissory Note and Loan Agreement, true and correct copies of which are attached hereto as Exhibits "B" and "C" respectively and incorporated herein by reference. Before the funding of the loan on June 1, 1983, Plaintiff advised FirstSouth that it had executed a written contract to sell the Rasor tract to Sterling-Coit for an approximate $10 million profit with such closing to take place on or before August 12, 1983. Accordingly, before FirstSouth actually loaned the money to Plaintiff on June 1, 1983, it knew that Plaintiff already had a contract to sell the property at a substantial profit within a short period of time. As evidence of such knowledge is the letter dated May 31, 1983, a true and correct copy of which is attached hereto as Exhibit "D" and incorporated herein by reference, wherein Defendant agreed to credit or refund a portion of the "commitment fee" if Plaintiff sold the property within 90 days, as it was apparent to the parties that such sale would take place.

6. On August 12, 1983, the sale of the property to Sterling-Coit took place and the note in the approximate amount of $20 million payable to Defendant FirstSouth was paid back by Plaintiff. Thus, Defendant loaned to Plaintiff approximately $20 million on June 1, 1983 and was paid back

approximately $23 million on August 12, 1983 for the use of the $20 million for a period of roughly 72 days. The $23 million figure is arrived at by adding to the $20 million loan approximately $500,000 in interest paid back plus $2.216 million in "profit." Plaintiff would further show that the "commitment fees" and "loan origination fees" and other fees charged and received by FirstSouth were not bona fide commitment fees and were not reasonably related to the value of any service performed by Defendant FirstSouth in the making of the loan since no service was performed. Such fees were in fact compensation for the loaning of money and should be deemed interest in the transaction. Accordingly, the principal amount of the loan should be reduced by the amount of loan commitment fees and loan origination fees used in the transaction for the purpose of making usury calculations.

7. On August 12, 1983, the same day as the closing of the sale by Plaintiff to Sterling-Coit of the Rasor tract, Plaintiff purchased approximately 91 acres of land located at Coit and Frankford Road in far North Dallas (the "Frankford property"). Defendant FirstSouth agreed to loan to Plaintiff in the aggregate $30 million to purchase and develop the Frankford property.

8. Under the loan agreement regarding the Frankford property, a true and correct copy of which is attached hereto as Exhibit "E" and incorporated herein by reference, Defendant FirstSouth also contracted to receive, in addition to interest, a twenty-five percent (25%) profit participation interest in the cash flow and net gain on the property. The appraised value of the Frankford property at the time the Frankford loan was closed was approximately $39 million. Additionally, FirstSouth charged and received various fees at the closing of the loan on the Frankford property which were

not bona fide commitment fees or other fees for any services rendered by FirstSouth so that such fees are to be deemed interest and have the effect of reducing the principal amount of the loan to Plaintiff to a lower true principal amount for the purpose of usury calculations.

9. In making the loan to purchase the Frankford property Defendant FirstSouth represented that it would loan additional monies for the development of the property and that it would carry the loan, by executing any necessary renewal notes, for at least five years unless the property was sold prior to that time. When the Frankford note matured on August 12, 1984, Defendant FirstSouth agreed to extend the maturity date to August 12, 1985, and then subsequently to August 12, 1986. However, in addition to the interest being charged by Defendant FirstSouth, Defendant FirstSouth charged "extension fees" in the amount of $450,000 for each extension of the maturity date of the note. Additionally, Defendant FirstSouth required Plaintiff to execute promissory notes in the amount of $3,000,000 and in the amount of $4.6 million dollars and charged other fees in addition to the extension fees, all of which fees are in fact interest which render the loan transactions usurious.

10. Defendant FirstSouth further represented to Plaintiff that under the terms of the loan agreements it would allow Plaintiff to draw down funds to make improvements to the property and would loan Plaintiff additional funds to carry the interest on the notes and would renew the notes until such time as the property could be sold. From December 1984 to August 1985, Plaintiff drew down approximately $3,000,000 to make improvements to the property, including construction of roads and thoroughfares, installation of sewer lines, and other improvements for the benefit of both Plaintiff and Defendant FirstSouth. Such improvements were made

with the consent of FirstSouth. In accordance with such agreement, as shown above, FirstSouth renewed the note on two different occasions to extend the maturity date to August, 1986. However, in August, 1986 Defendant FirstSouth refused to renew the notes as it had represented it would, and has now demanded payment of the notes and has threatened to foreclose on the real property.

COUNT I.

USURY

11. Plaintiff alleges and incorporates herein by reference paragraphs 1 through 10 above.

12. With respect to the Rasor tract, Defendant FirstSouth has contracted for, charged or received interest in excess of twice the amount allowed by law, or alternatively, in excess of the amount allowed by law, by reason of the "commitment" fees, "origination" fees, other fees and "profit" received which are in reality compensation for the use of money. Accordingly, Plaintiff is entitled to recover from Defendant FirstSouth three times the amount of usurious interest contracted for, charged or received by Defendant FirstSouth and return of all principal paid to FirstSouth and twice the amount of all interest charged or received, and its reasonable and necessary attorney fees as well as costs of suit, all of which exceed the minimum jurisdictional requirements of this Court. Alternatively, Plaintiff is entitled to recover three times the amount of usurious interest charged or received and its reasonable and necessary attorney fees.

13. Respecting the Frankford property, FirstSouth has contracted for, charged or received interest in excess of twice the amount allowed by law, or alternatively, in excess of the amount allowed by law, in contracting for a "profit

participation," and in charging fees which are not reasonably related to the value of any services performed by Defendant. Accordingly, Plaintiff is entitled to the statutory penalties and recoveries at common law as outlined in paragraph 12 above.

COUNT II.

BREACH OF FIDUCIARY DUTY AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

14. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 10 above.

15. Alternatively, Plaintiff seeks a declaration that Defendant FirstSouth was in reality a partner with Coit Independence Joint Venture by reason of its profit sharing interest in the joint venture and by reason of the understanding of the parties that FirstSouth would act as the "financial partner" in the enterprise and the other co-venturers would act as the "service partners" to develop and market the property for resale at a profit to benefit all the venturers. As a partner, FirstSouth owes Plaintiff a fiduciary duty to deal with its partners in a manner that will not destroy or impair partnership assets. FirstSouth's failure to provide the agreed upon capital and operating contributions for the properties and to deal with its partners in a fair manner constitutes a breach of its fiduciary duty to Plaintiff and its implied duty of good faith and fair dealing.

16. As a direct and proximate result of the wrongful conduct of FirstSouth, Plaintiff has been damaged in an amount that exceeds the jurisdictional minimum of this Court.

WHEREFORE, Plaintiff respectfully requests that Defendant FirstSouth be cited to appear and answer and upon final hearing Plaintiff have judgment against FirstSouth in the amounts prayed for above, or alternatively, that Plaintiff have

declaratory judgment, that the relationship between it and Defendant FirstSouth was that of partner or joint venturer and further declaration that any alleged note, deed of trust, guaranty or other document is unenforceable as a loan or guaranty against Plaintiff. Plaintiff further prays for its pre-judgment and post-judgment interest as allowed by law, for damages on its usury claim according to the statute, its reasonable attorney fees, costs and such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

s/PAUL E. GALVIN
JAY L. GUECK
State Bar No. 08566800

PAUL E. GALVIN
State Bar No. 07601300

of AKIN, GUMP, STRAUSS,
HAUER & FELD
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-4618
Telephone: (214) 969-2800

Attorneys for Plaintiff

VERIFICATION

THE STATE OF TEXAS }
COUNTY OF DALLAS } ss:

BEFORE ME, the undersigned authority, on this day personally appeared Charles C. Taylor, who being first duly sworn, upon his oath stated he is a Managing Joint Venturer of Coit Independent Joint Venture, that he has authority to execute this Verification, that he has knowledge of the facts set forth in paragraphs 1-13 of Plaintiff's Original Petition, and that the facts stated therein are true and correct.

s/CHARLES C. TAYLOR

SUBSCRIBED AND SWORN TO BEFORE ME this *24th* day of October, 1986.

s/SANDRA L. HOWERTON
Notary Public in and
for the State of Texas

Sandra L. Howerton

My commission expires:

August 29, 1989

ANDREWS & KURTH

Coit/Independence Project

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October 9, 1987

Certified Mail No.
P-498 070 244
Return Receipt Requested

Coit Independence Joint Venture
16800 Dallas Parkway,
Suite 210
Dallas, Texas 75248

Attention: David L. Gray

Certified Mail No.
P-498 070 246
Return Receipt Requested

Mr. A. Starke Taylor, Jr.
Coit Independence Joint Venture
Dallas, Texas 75248

Certified Mail No.
P-498 070 245
Return Receipt Requested

Mr. Charles C. Taylor
Coit Independence Joint Venture
16800 Dallas Parkway,
Suite 210
Dallas, Texas 75248

Certified Mail No.
P-498 070 247
Return Receipt Requested

Mr. David L. Gray
Coit Independence Joint Venture
16800 Dallas Parkway,
Suite 210
Dallas, Texas 75248

Re: Notice of Acceleration and Foreclosure

Dear Sir:

Please be advised that because of the unpaid indebtedness referenced in the attached Notice of Sale by Substitute Trustee by which Joseph M. Osborne, Substitute Trustee acting at the direction and request of the Federal Savings And Loan Insurance Corporation, as Receiver for FirstSouth, F.A. (the "Receiver") gives notice of sale at foreclosure of the property therein described, and because of the currently existing default in regard thereto, all of said indebtedness has been and hereby is accelerated. In addition, foreclosure of all property described therein will be made in accordance with the terms of said notice unless payment in full of the described indebtedness is made prior to the foreclosure date. Please note that said foreclosure will occur on the first Tuesday of the next month, same being November 3, 1987 between the hours of 10:00 a.m. and 4:00 p.m. at the steps of the Collin County Courthouse in McKinney, Texas.

Enclosed are the Federal Home Loan Bank Board's Procedures for the Administration and Determination of Requests for Expedited Relief from Decisions or Threatened Actions of the FSLIC as Receiver. Any questions regarding the Bank Boards procedures should be directed to the Federal Home Loan Bank Board, Adjudication Division, 1700 G. Street, N.W. Washington, D.C. 20552; (202) 377-7399.

Very truly yours,

/s/ JOSEPH M. OSBORNE
Joseph M. Osborne

Enclosures

cc: Donna R. Harrigan
Special Representative for FSLIC
as Receiver for FirstSouth, F.A.
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Little Rock, AR 72201

James P. Cooke, Esq.
Hopkins & Sutter
545 East John Carpenter Freeway
Irving, TX 75062

Steven D. Chantelois,
Federal Asset Disposition Association
5080 Spectrum Drive
Suite 1100 E
Dallas, TX 75248

Home Federal Savings and Loan
100 South Main
Mountain Home, AR 72653

Attention: Eddie King

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

12 U.S.C. § 1464(d)(6)(C) of the Home Owners Loan Act of 1933 provides:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the [Federal Home Loan Bank] Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

12 U.S.C. § 1728(c) of the National Housing Act provides:

> No action against the [Federal Savings and Loan Insurance] Corporation to enforce a claim for payment of insurance upon an insured account of an insured institution in default shall be brought after the expiration of three years from the date of default unless, within such three-year period, the conservator, receiver, or other legal custodian of the insured institution shall have recognized such insured account as a valid claim against the insured institution and the claim for payment of insurance shall have been presented to the Corporation and its validity denied, in which event the action may be brought within two years from the date of such denial.

12 U.S.C. § 1729(c) and (d) of the National Housing Act provide:

> Powers of Corporation and Federal Home Loan Bank Board on Default of other institutions
>
> (c)(1) In the event any insured institution other than a Federal savings and loan association is in default, the Corporation shall have authority to act as conservator, receiver, or other legal custodian of such insured institution, and the services of the Corporation are tendered to the court or other public authority having the power of

> appointment. If the Corporation is so appointed, it shall have the same powers and duties with respect to the insured institution in default as are conferred upon it under subsection (b) of this section with respect to Federal savings and loan associations. If the Corporation is not so appointed it shall pay the insurance as provided in section 1728 of this title, and shall have power (1) to bid for the assets of the insured institution in default, (2) to negotiate for the merger of the insured institution or the transfer of its assets, or (3) to make any other disposition of the matter as it may deem in the best interests of all concerned.
>
> (2) In the event of the Federal Home Loan Bank Board determines —
>
> (A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal savings and loan association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;
>
> (B) that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole receiver for such institution. As used in this paragraph (2), the term "State" includes the Commonwealth of Puerto Rico, the territories and possessions, and any place subject to the jurisdiction of the United States.

(3) In any case where the Corporation is appointed receiver of an insured institution pursuant to paragraph (2) —

(A) the provisions of section 1464(d) of this title shall be applicable in the same manner and to the same extent as if such institution were a Federal savings and loan association with respect to the Corporation had been appointed receiver under paragraph (6) thereof, and the provisions of paragraph (14) of said subsection (d) shall be applicable in the same manner and the same extent that they would be applicable if the insured institution were an institution referred to in the first sentence of said paragraph; and

(B) the Corporation shall have authority to liquidate such institution in an orderly manner or to make such other disposition of the matter as it deems to be in the best interests of the institution, its savers, and the Corporation.

In connection with the liquidation of any such institution, the language "the court or other public authority having jurisdiction over the matter" in subsection (d) this section shall mean the Board.

Additional Powers of Corporation

(d) In connection with the liquidation of insured institutions in default, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

12 U.S.C. § 1730(k)(1) of the National Housing Act provides:

Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court of the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before

final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court.

Section 549.4 of the Federal Home Loan Bank Board Regulations provides, in relevant part:

(b) The receiver shall allow any claim seasonably received and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor. Mailing notice of the disallowance to the claimant's last address appearing on the association's books or on the proof of claim shall be sufficient notice. Unless, within 30 days after notice is mailed, the claimant files a written request for payment regardless of the disallowance, disallowance shall be final, except as the Board may otherwise determine.

Section 569a.8 of the Federal Home Loan Bank Board Regulations provides, in relevant part:

(b) any claim filed on or before the date fixed pursuant to paragraph (a) of this section and proved to the satisfaction of the Receiver shall be allowed by the Receiver. The Receiver may disallow in whole or in part any creditor claim or claims of security, or priority not proved to its satisfaction, and notice of such disallowance or rejection together with the reason therefor shall be served by the Receiver upon the claimant by certified mail. The mailing of notice of such disallowance or rejection to the last known address of any claimant appearing on the books or the proof of claim shall be deemed sufficient for the purposes hereof.

Supreme Court, U.S.
FILED
FEB 16 1988
JOSEPH F. SPANIOL, JR.

No. 87-996

In the Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF FIRSTSOUTH, F.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

CHARLES FRIED
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Department of Justice
Washington, D.C. 20530
(202) 633-2217

JORDAN LUKE
General Counsel
Federal Home Loan Bank Board
Washington, D.C. 20552

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In the Supreme Court of the United States

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FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF FIRSTSOUTH, F.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner contends that the court of appeals erred in affirming a district court's dismissal of petitioner's suit against an insolvent federally insured savings association. A similar contention, involving essentially the same issues, is already pending before this Court in another petition for a writ of certiorari to the same court of appeals, *Zohdi v. FSLIC*, petition for cert. pending, No. 87-255 (filed Aug. 5, 1987). The petition in this case accordingly should be held for disposition in light of the Court's disposition of the petition in *Zohdi*.

1. From 1983 to 1986, petitioner received several loans from and engaged in other dealings with FirstSouth, F.A., a federal savings association. Petitioner and FirstSouth encountered difficulties in their relationship and, in October 1986, petitioner sued FirstSouth in state court for usury, breach of fiduciary duty, and breach of a duty of

good faith and fair dealing. Two months later, the Federal Home Loan Bank Board declared FirstSouth insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver. See 12 U.S.C. (Supp. IV) 1464(d)(6)(A). FSLIC removed petitioner's suit to federal court and sought dismissal on the ground that petitioner's claims must be presented in FSLIC's administrative claims procedure. See 12 C.F.R. 549.4. The district court dismissed, relying on *North Mississippi Savings & Loan Ass'n* v. *Hudspeth,* 756 F.2d 1096 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986). See Pet. App. A1-A2, A5.

Petitioner appealed the district court's decision, contending that Congress had not given FSLIC authority to resolve state law claims against an insolvent thrift institution and that administrative resolution of those claims would violate various constitutional provisions. The court of appeals affirmed in a per curiam decision. The court rejected petitioner's statutory claims, relying on its previous decision in *Hudspeth,* as reaffirmed in *FSLIC* v. *Bonfanti,* 826 F.2d 1391 (5th Cir. 1987), petition for cert. pending *sub nom. Zohdi* v. *FSLIC,* No. 87-255; *Goodwin* v. *FSLIC,* 806 F.2d 1290 (5th Cir. 1987); and *Chupik Corp.* v. *FSLIC,* 790 F.2d 1269 (5th Cir. 1986). See Pet. App. A2. The court further noted that petitioner's constitutional arguments were not ripe for resolution (*id.* at A4).

2. The basic statutory question petitioner raises here—whether claims against an insolvent federally insured savings and loan association must be presented in the first instance in federal receivership proceedings in accordance with the Federal Home Loan Bank Board's regulations for the administrative resolution of such claims—is important and has divided the federal courts of appeals. Compare *North Mississippi Savings & Loan Ass'n* v. *Hudspeth, supra,* with *Morrison-Knudsen Co.* v. *CHG International, Inc.,* 811 F.2d 1209 (9th Cir. 1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates,* No. 87-451. The question, however, is already pending before this Court in a previously filed petition for a writ of certiorari to the same court of appeals. See *Zohdi* v. *FSLIC,* No. 87-255. The Solicitor General has urged this Court to grant that petition, limited to the question as stated in the government's brief.[1] As for petitioner's constitutional objections, the court of appeals properly declined to decide them on the ground that they "are not ripe for resolution at this time" (Pet. App. A4). The court of appeals subsequently announced that it would hear argument on the constitutional questions in another case. See *Thomes* v. *Equitable Savings & Loan Ass'n,* 831 F.2d 558 (5th Cir. 1987). Thus, even if the constitutional issues warranted this Court's review, there is no occasion for the Court to consider those questions at this juncture.

It is therefore respectfully submitted that the petition in this case should be held pending disposition of the petition in No. 87-255 and then disposed of as appropriate.

CHARLES FRIED
Solicitor General

JORDAN LUKE
General Counsel
Federal Home Loan Bank Board

FEBRUARY 1988

---

[1] The Solicitor General has also filed petitions for writs of certiorari to the Ninth Circuit raising the same question and has urged that those petitions should be held pending disposition of the petition in No. 87-255 and then disposed of as appropriate. See *FSLIC* v. *Stevenson Associates,* No. 87-451 (filed Sept. 17, 1987); *FSLIC* v. *Murdock-SC Associates,* No. 87-452 (filed Sept. 17, 1987).

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Supreme Court, U.S.
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MAY 4 1988
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CLERK

No. 87-996

In The

Supreme Court of the United States

October Term, 1987

COIT INDEPENDENCE JOINT VENTURE,

Petitioner,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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Attorney for Respondent

Petition for Writ of Certiorari filed December 14, 1987
Certiorari granted March 7, 1988

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DISTRICT COURT RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1986		
Dec. 31	1	PETITION FOR REMOVAL w/attached state court papers (FSLIC as receiver for Firstsouth, F.A.) (15+) pm
1987		
Feb. 19	4	MOT OF FSLIC TO DISMISS PLTF'S COMPLAINT (4). (FSLIC). tn
Feb. 25	6	ORDER . . . The FSLIC has been appointed as receiver for Firstsouth. The Mot of the FSLIC to Dismiss the Pltf's Complaint is Granted. cys. to cnsl. JB/tn
Mar. 18	10	COIT INDEPENDENCE JOINT VENTURE'S MOTION FOR RECONSIDERATION AND RESPONSE TO MOTION OF FSLIC TO DISMISS (5) m
Mar. 27	12	NOTICE OF APPEAL by Plaintiff COIT INDEPENDENCE JOINT VENTURE from the Order dismissing action on February 25, 1987. (2) g
Apr. 9	15	ORDER: That Plaintiff's motion to reconsider and vacate and its motion to remand shall be and hereby are DENIED, and it is further ORDERED that the court's order of February 25, 1987 dismissing this action shall not be disturbed. Dckt 4-8-87 cc to counsel JB/trw
Apr. 7	14a	FSLIC'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION (8).
Apr. 23	16	NOTICE OF APPEAL by plaintiff Coit Independence Joint Venture from the order dismissing pltf's action on February 25, 1987 and the order denying pltf's motion to reconsider and vacate and its motion to remand entered herein on April 9, 1987. (1) TO given to attorney at counter. trw

FIFTH CIRCUIT RELEVANT DOCKET ENTRIES

2/10/88 Flg. Order denying mot. of appellant to recall the Court's mandate. Further denying mot. of appellant to enlarge the time for flg. a pet. for rehearing and sugg. for rehearing en banc. (SDJ)

3/ 7/88 (X) Cert. Pet. Granted

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Coit Independence Joint Venture	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	
	)	CA3-86-3185-R
FIRSTSOUTH, F.A.,	)	
Defendant.	)	

PETITION FOR REMOVAL

(Filed Dec. 31, 1986)

The Federal Savings and Loan Insurance Corporation ("FSLIC"), as Receiver for FIRSTSOUTH, F.A. ("FIRSTSOUTH"), by its counsel, appearing specially, waiving no rights, and without consenting to be sued, petitions this Court to remove the above-entitled action and in support of this petition states as follows:

1. The above-entitled action is now pending in the District Court for Dallas County, 95th Judicial District as Case No. 86-14274-D. Copies of pleadings served on the defendant in that action are attached hereto in accordance with 28 U.S.C. § 1446(a).

2. This Court has original jurisdiction over the above-entitled action under the provisions of 12 U.S.C. § 1730(k)(1) and 28 U.S.C. §§ 1331 and 1346. It may be removed to this Court by the Receiver pursuant to 12 U.S.C. § 1730(k)(1)(C) and 28 U.S.C. § 1441. The basis for this Court's original jurisdiction and for removal are set forth in the following paragraphs in accordance with the requirements of 28 U.S.C. § 1446(a).

(a) Prior to December 5, 1986, FIRSTSOUTH was a federally-chartered savings and loan association. On December 5, 1986, FSLIC was appointed by the Federal Home Loan Bank Board ("FHLBB") as Receiver for FIRSTSOUTH, pursuant to 12 U.S.C. § 1464(d)(6)(A) and 12 U.S.C. § 1464(d)(6)(B)(i) on several grounds including that FIRSTSOUTH was insolvent within the meaning of 12 U.S.C. § 1464(d)(6)(A)(i). Pursuant to federal law, FSLIC as Receiver is a party to this proceeding. 12 C.F.R. § 547.7. A copy of the FHLBB Resolution appointing the FSLIC as Receiver for FIRSTSOUTH is attached hereto as Exhibit A.

(b) Pursuant to 12 U.S.C. § 1730(k)(1)(B), "any civil action, suit, or proceeding to which the [FSLIC] shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy." Section 1730(k)(1)(C) further provides that (except for one exception not applicable to this case) "the [FSLIC] may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect." FSLIC, therefore, has an absolute right to remove this action and need not post a bond or other security.

(c) As an additional basis for federal jurisdiction, the FSLIC is an agency and instrumentality of the United States, 12 U.S.C. § 1437(b), 12 U.S.C.

§ 1730(k)(1). This Court therefore has original jurisdiction under 28 U.S.C. § 1346 and this action may be removed pursuant to 28 U.S.C. § 1441.

3. In accordance with 28 U.S.C. § 1446(b), this petition is filed within 30 days of the appointment of FSLIC as Receiver for FIRSTSOUTH upon which removal of this action is based.

WHEREFORE, Petitioner prays that the above-entitled action now pending against FSLIC as Receiver for FIRSTSOUTH in the District Court for Dallas County, 95th Judicial District Court be removed to this Court.

Respectfully Submitted,

By: /s/ Kenneth E. Johns, Jr.
KENNETH E. JOHNS, Jr.
2020 LTV Center
2001 Ross Avenue
Dallas, Texas 75201-2916

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by Certified Mail, Return Receipt Requested, to counsel of record, as follows, on this 30th day of December, 1986.

/s/ Kenneth E. Johns, Jr.
Kenneth E. Johns, Jr.

CERTIFIED MAIL

Mr. J. L. Gueck
Akin, Gump, Strauss,
Hauer & Feld
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-2618

Mr. Paul E. Galvin
Akin, Gump, Strauss,
Hauer & Feld
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-2618

COUNTY OF PULASKI)
) SS.
STATE OF ARKANSAS)

Verification

Donna R. Harrigan, having been sworn on oath deposes and states that (1) she is the Special Representative for the Federal Savings and Loan Insurance Corporation, (2) she is authorized to make this affidavit, (3) she has read the foregoing petition, and (4) the facts set forth therein are true and correct to the best of her knowledge.

/s/ Donna R. Harrigan

Subscribed and sworn to
before me this 10th day
of December, 1986.

/s/ Sherrie LuDan
Notary Public

My commission expires:
11 April 1992

FEDERAL HOME LOAN BANK BOARD

(EAGLE)

To all to whom these presents shall come, Greeting:

I CERTIFY That hereto annexed are true copies of documents described below made from records of the Federal Home Loan Bank Board, which records are in the

official custody of the Secretary to said Board and are on file in its offices at 1700 G Street, Northwest, Washington in the District of Columbia, to wit:

Federal Home Loan Bank Board Resolution No. 86-1200, dated December 4, 1986

(SEAL)

In testimony whereof, I, Melanie Daly, Assistant Secretary to the Federal Home Loan Bank Board have hereunto caused the Seal of said Board to be affixed and my name subscribed hereto, in the District of Columbia, this 4th day of December, 1986.

/s/ Melanie Daly
Assistant Secretary to the
Federal Home Loan Bank Board

EXHIBIT A

FEDERAL HOME LOAN BANK BOARD

Appointment of Receiver for
First South, F.A.,
Pine Bluff, Arkansas

No. 86-1200 P

Date: December 4, 1986

WHEREAS, FirstSouth, F.A., Pine Bluff, Arkansas ("Association"), is a federally-chartered stock savings and loan association, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"); and

WHEREAS, The Federal Home Loan Bank Board ("Bank Board") has exclusive power and jurisdiction to appoint the FSLIC as sole conservator or receiver for a

Federal savings and loan association in the event that the Bank Board determines that any of the grounds specified in § 5(d)(6)(A)(i), (ii), (iii), (iv) or (v) of the Home Owner's Loan Act of 1933, as amended ("HOLA"), 12 U.S.C. § 1464(d)(6)(A)(i), (ii), (iii), (iv) or (v) (1982), exists with respect to such association; and

WHEREAS, Pursuant to § 5(d)(6)(D) of the HOLA, 12 U.S.C. § 1464(d)(6)(D) (1982), the Bank Board shall appoint only the FSLIC as receiver for a Federal savings and loan association; and

WHEREAS, The Bank Board has considered staff memoranda dated December 4, 1986, together with accompanying attachments and exhibits (copies of which memoranda are in the Minute Exhibit File), and the balance of the administrative record submitted to it:

Grounds for Appointment

NOW, THEREFORE, IT IS RESOLVED, That, the Bank Board finds, on the basis of the record before it, including, but not limited to, oral presentations before the Bank Board, that the grounds specified in § 5(d)(6)(A)(i), (ii) and (iii) of the HOLA, 12 U.S.C. § 1464(d)(6)(A)(i), (ii) and (iii) (1982), exist with respect to the Association in that (i) the Association is insolvent in that its assets are less than its obligations to its creditors and others, including the holders of its withdrawable accounts, (ii) the Association has incurred substantial dissipation of assets or earnings due to violations of law, rules, and regulations and to unsafe and unsound practices, and (iii) the Association is in an unsafe and unsound condition to transact business; and

Consent to Appointment

RESOLVED, FURTHER, That the Bank Board finds that, by a Consent Agreement dated November 14, 1986, executed by the board of directors of the Association, the Association has consented to the appointment of a conservator, receiver, or other legal custodian for the Association; and

Appointment of Receiver

RESOLVED FURTHER, That the Bank Board, pursuant to § 5(d)(6)(A) of the HOLA, 12 U.S.C. § 1464(d)(6)(A) (1982), and pursuant to section 5(d)(6)(B) of the HOLA, 12 U.S.C. 1464(d)(6)(B) (1982), hereby appoints the FSLIC as sole receiver for the Association ("Receiver") for the purpose of liquidation; and

Powers and Duties of Receivers

RESOLVED FURTHER, That the FSLIC as Receiver shall have and exercise all powers, rights, and privileges, and shall assume, perform, and discharge all duties, responsibilities, and obligations of a receiver for a Federal savings and loan association accorded or imposed by, and subject to, applicable provisions of law and regulations and orders of the Bank Board, including, but not limited to, § 5(d) of the HOLA, 12 U.S.C. § 1464(d) (1982), section 406 of the National Housing Act, as amended, 12 U.S.C. § 1729 (1982), and the provisions of Parts 547 and 549 of the Rules and Regulations for the Federal Savings and Loan System ("Federal Regulations"), 12 C.F.R. Parts 547 and 549 (1986); and

RESOLVED FURTHER, That, in addition to all powers and authority of a receiver provided for by law, regulation,

and order, the Receiver is hereby authorized and empowered, and need not seek further approval from the Bank Board, to borrow money in such amounts from any source and in any manner as the Receiver requires to fulfill its duties as receiver, to execute, acknowledge, and deliver evidence of indebtedness for such borrowings, and to secure repayment of such borrowings by mortgages, pledges, and assignments in trust, or hypothecation of any property of the Association, *provided* that the form of any contract or security agreement for such borrowings shall be approved by the Office of the General Counsel ("OGC"); and

RESOLVED FURTHER, That the Receiver, in exercising its power of sale pursuant to § 549.3(b)(4) of the Federal Regulations, 12 C.F.R. Part 549.3(b)(4) (1986), may make loans to facilitate the sale of property of the Association, *provided* that any such loans may not include any amount attributable to future interest, fees, or expenses; and

RESOLVED FURTHER, That the Receiver need not furnish any bond; and

RESOLVED FURTHER, That, notwithstanding the provisions of § 548.1, as made applicable by § 549.2, of the Federal Regulations, 12 C.F.R. §§ 548.1 and 549.2 (1986), the Receiver may elect to notify by certified mail all persons and entities that the Receiver knows to be holding or to be in possession of assets of the Association; and

Payment of Claims by FSLIC

RESOLVED FURTHER, That the FSLIC, in its corporate capacity, and not as Receiver ("Corporation") is hereby authorized to pay in full any claims against the

Receiver, the payment of which the Director has determined will benefit the FSLIC in its corporate capacity, as subrogee of the insured accountholders of the Association pursuant to the payment by the FSLIC of the insured accounts of the Association or as subrogee of the Federal Home Loan Bank of Dallas, *provided,* however, that no such payment shall exceed $10,000 per claimant and such payments shall not total in the aggregate more than $500,000, and *provided further,* that upon payment of each such claim, the FSLIC, in its corporate capacity, shall obtain from each such claimant an assignment of each such claim or the right to make such claim, and *provided* further, that the form of any such assignment shall be approved by the OGC; and

Implementing Authority

RESOLVED FURTHER, That the Director, Deputy Director, or Director of the Operations and Liquidations Division, Office of FSLIC or the designee of any of them ("Director") is hereby authorized to take such action as may be necessary or appropriate to carry out the obligations of the FSLIC as Receiver, pursuant to its appointment; and

RESOLVED FURTHER, That the Corporation is hereby authorized to make advances to the Receiver, evidenced by written documents, for the purpose of enabling the Receiver to perform its functions and duties, to pay costs and expenses of the receivership, and to enable the Receiver to administer or improve assets pledged to secure the repayment of obligations to the FSLIC, on such terms and conditions as the Director shall deem appropriate, and the Director may execute such documents as may be necessary to make such advances and enter into related collateral

agreements, *provided* that the final forms of any such documents or agreements have been approved by the OGC; and

RESOLVED FURTHER, That the Corporation is hereby authorized to make loans to the Receiver, evidenced by written documents, on such terms and conditions as the Director shall deem appropriate, for the purpose of enabling the Receiver to repay any claims to the extent that such claims are secured by a lien on property of the Association or in which the Association has an interest, and that such property or interest has a value equal to or greater than such secured claims, and the Director may execute such documents as may be necessary to make such loans and enter into related collateral agreements, *provided* that property securing such claims, and having a value equal to or greater than such claims, shall be pledged to the Corporation to secure the repayment of such loans made by the FSLIC to the Receiver, and *provided further* that the final forms of any documents or agreements executed pursuant to the authority of this resolving paragraph have been approved by the OGC; and

RESOLVED FURTHER, That the Corporation is hereby authorized to make loans to the Receiver, evidenced by written documents, on such terms and conditions as the Director shall deem appropriate, for the purpose of enabling the Receiver to repay Bank Advances guaranteed by the Corporation ("Guaranteed Advances"), and the Director may execute such documents as may be necessary to make such loans and enter into related collateral agreements, *provided* that property securing such Bank Advances shall be pledged to the Corporation to secure the

repayment of such loans made by the FSLIC to the Receiver, and *provided further* that any loan made by the FSLIC to the Receiver to repay Guaranteed Advances shall be an unsecured claim of the sixth category, as specified in the Bank Board resolution to be adopted immediately subsequent to this resolution, to the extent that the collateral securing such Guaranteed Advances has a value less than the amount of such advances; and *provided further* that the final forms of any documents or agreements executed pursuant to the authorization of this resolving paragraph have been approved by the OGC; and

RESOLVED FURTHER, That the Receiver is hereby authorized to repay any loans made to it by the Corporation with property, including property pledged to the FSLIC as collateral for such loans, and the Director is hereby authorized to accept such form of payment, and the Director may execute such documents or agreements as may be necessary to accomplish such repayment, *provided* that the final forms of any such documents or agreements have been approved by the OGC; and

RESOLVED FURTHER, That the Corporation is hereby authorized to obtain assignments of claims of the Receiver, and the Receiver is authorized to render such assignments to the Corporation, *provided* that the Corporation shall either pay fair value for any such claim or shall agree to pay over to the Receiver all proceeds received on the claim in excess of the expenses incurred by the Corporation in pursuing such claim, and *provided further,* that the form of any such assignment shall be approved by the OGC; and

Designation of Agents

RESOLVED FURTHER, That J.M. Belanger, Tim J. Taylor, John Vella, Donna Harrigan, and E. Kelly Jones are each hereby designated as agents of the Bank Board and the FSLIC for the purposes of acting as Special Representatives of the FSLIC as Receiver; and

Special Representatives

RESOLVED FURTHER, That one or more persons shall be designated as Special Representative of the Receiver ("SR"); that such designated person or persons shall have the power and authority to act in the name and on behalf of the Receiver, including the authority, subject to the direction of the Director, to take prompt possession of the books, records, property, and assets of every kind and description of the Association and to exercise all powers of the Receiver; that, initially, Edward F. Gerber, J.M. Belanger, Tim J. Taylor, John Vella, Donna Harrigan, E. Kelly Jones, Ann N. Barnes, James W. Wigand, John W. Sears, Thomas R. Procopio, William V. Ponds, and J. Andrew Read, each serve as SR; and that the Director may replace or remove any SR and may designate such additional SR(s) as the Director deems appropriate, prescribing the functions and responsibilities of such SR(s) as the Director deems appropriate provided, however, that any SR designated under this resolving paragraph shall not act for or on behalf of the FSLIC in its corporate capacity with regard to the Association in receivership; and

Indemnification of Special Representatives

RESOLVED FURTHER, That the Director is hereby authorized to enter into a contract on behalf of the FSLIC,

acting in its corporate capacity and not as Receiver, to indemnify, to the extent not indemnified from the assets of the Association and under applicable law, any person who is not an employee of the United States Government, or any agency thereof, and who accepts appointment to act as an SR pursuant to this Resolution, and to hold such persons harmless against any loss or liability that may arise from such person's good faith performance of his or her fiduciary duties and responsibilities as an SR; *provided* that the final form of any agreement providing for such indemnification is approved by the OGC; and

Termination of Employment Contracts

RESOLVED FURTHER, That every employment contract between the Association and its officers, employees, agents or consultants is hereby terminated by the Bank Board, effective upon the date of default of the Association; and

Records and Reports

RESOLVED FURTHER, That each SR shall keep a record of his or her actions as SR for the Receiver and shall report on such actions from time to time as directed by the Director; and

RESOLVED FURTHER, That the Director shall from time to time report to the Bank Board with respect to actions taken pursuant to this Resolution.

By the Federal Home Loan Bank Board

/s/ Jeff Sconyers
Secretary

NO. 86-14-74

COIT INDEPENDENCE JOINT VENTURE, Plaintiff,	)	IN THE DISTRICT COURT OF
vs.	)	DALLAS COUNTY, TEXAS
FIRSTSOUTH, F.A., Defendant.	)	95th JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

Coit Independence Joint Venture, Plaintiff, files this its Original Petition complaining of FirstSouth, F.A. ("FirstSouth"), Defendant, and as grounds therefor would show the following:

PARTIES

1. Plaintiff is a joint venture organized and existing in accordance with the laws of the State of Texas with its place of business in Dallas County, Texas.

2. Defendant FirstSouth is a federal association organized and existing under the laws of the United States. The principal place of business of FirstSouth is in Pine Bluff, Arkansas. FirstSouth has done business and is doing business in the State of Texas by entering into contracts with Texas residents which are performable in whole or in part in the State of Texas. FirstSouth has not designated an agent upon whom service may be made and therefore may be served by serving the Secretary of State of Texas to be forwarded to the President of FirstSouth, William Bruton, at the address of FirstSouth's principal place of business at Post Office Box 5900, Pine Bluff, Arkansas 71611.

BACKGROUND

3. In May of 1983, Plaintiff was assigned the right to purchase from the trustees of E Systems, Inc. Pool Trust, approximately 1,000 acres of land (the "Rasor tract") for approximately $20 million. The closing of the purchase of the Rasor tract was scheduled for June 1, 1983. During April and May of 1983, various entities approached representatives of Plaintiff inquiring about purchasing the Rasor tract from Plaintiff after the June 1, 1983 closing. After various meetings and discussions, an oral agreement in principle to sell the property was reached between Plaintiff and Sterling-Coit, Ltd. The agreement in principle was reduced to a written contract of sale and signed on May 26, 1983 between Plaintiff and Sterling-Coit to sell the Rasor tract at a profit of approximately $10 million. That sale was scheduled to close within seventy-five days of the date of the contract and did in fact close on August 12, 1983 when the Rasor tract was sold at a profit of approximately $10 million.

4. During March and April of 1983, Plaintiff was also seeking financing to purchase the Rasor tract for the scheduled closing of June 1, 1983. Plaintiff spoke with various lenders, and in early April of 1983, Plaintiff was put in touch with Defendant FirstSouth and one of its officers, Joel Cheatham. In seeking financing for the property, Plaintiff's representatives advised FirstSouth that there was little or no risk in loaning the money to purchase the property for the reason that Plaintiff had verbal commitments from a potential purchaser to buy the property at an approximate $10 million profit. Defendant FirstSouth, upon learning that Plaintiff would be selling the property for an approximate $10 million profit in a

very short period of time, advised Plaintiff that it would be willing to loan to Plaintiff up to an aggregate amount of $31 million if Plaintiff agreed to pay to Defendant not only the calculated interest rate at the treasury bill rate plus 4.25% but, as additional compensation for the use of the funds, a 25% "profit participation" interest and a "loan origination fee" or "commitment fee" in the approximate amount of $310,000, approximately $100,000 of which was refunded upon funding of the loan. The basic agreement between the parties is evidenced by the April 13, 1983 commitment letter, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference.

5. Thereafter, on June 1, 1983, Defendant loaned to Plaintiff the approximate amount of $20 million under the terms of the Promissory Note and Loan Agreement, true and correct copies of which are attached hereto as Exhibits "B" and "C" respectively and incorporated herein by reference. Before the funding of the loan on June 1, 1983, Plaintiff advised FirstSouth that it had executed a written contract to sell the Rasor tract to Sterling-Coit for an approximately $10 million profit with such closing to take place on or before August 12, 1983. Accordingly, before FirstSouth actually loaned the money to Plaintiff on June 1, 1983, it knew that Plaintiff already had a contract to sell the property at a substantial profit within a short period of time. As evidence of such knowledge is the letter dated May 31, 1983, a true and correct copy of which is attached hereto as Exhibit "D" and incorporated herein by reference, wherein Defendant agreed to credit or refund a portion of the "commitment fee" if Plaintiff sold the property within 90 days, as it was apparent to the parties that such sale would take place.

6. On August 12, 1983, the sale of the property to Sterling-Coit took place and the note in the approximate amount of $20 million payable to Defendant FirstSouth was paid back by Plaintiff. Thus, Defendant loaned to Plaintiff approximately $20 million on June 1, 1983 and was paid back approximately $23 million on August 12, 1983 for the use of the $20 million for a period of roughly 72 days. The $23 million figure is arrived at by adding to the $20 million loan approximately $500,000 in interest paid back plus $2.216 million in "profit." Plaintiff would further show that the "commitment fees" and "loan origination fees" and other fees charged and received by FirstSouth were not bona fide commitment fees and were not reasonably related to the value of any service performed by Defendant FirstSouth in the making of the loan since no service was performed. Such fees were in fact compensation for the loaning of money and should be deemed interest in the transaction. Accordingly, the principal amount of the loan should be reduced by the amount of loan commitment fees and loan origination fees used in the transaction for the purpose of making usury calculations.

7. On August 12, 1983, the same day as the closing of the sale by Plaintiff to Sterling-Coit of the Rasor tract, Plaintiff purchased approximately 91 acres of land located at Coit and Frankford Road in far North Dallas (the "Frankford property"). Defendant FirstSouth agreed to loan to Plaintiff in the aggregate $30 million to purchase and develop the Frankford property.

8. Under the loan agreement regarding the Frankford property, a true and correct copy of which is attached hereto as Exhibit "E" and incorporated herein by ref-

erence, Defendant FirstSouth also contracted to receive, in addition to interest, a twenty-five percent (25%) profit participation interest in the cash flow and net gain on the property. The appraised value of the Frankford property at the time the Frankford loan was closed was approximately $39 million. Additionally, FirstSouth charged and received various fees at the closing of the loan on the Frankford property which were not bona fide commitment fees or other fees for any services rendered by FirstSouth so that such fees are to be deemed interest and have the effect of reducing the principal amount of the loan to Plaintiff to a lower true principal amount for the purpose of usury calculations.

9. In making the loan to purchase the Frankford property Defendant FirstSouth represented that it would loan additional monies for the development of the property and that it would carry the loan, by executing any necessary renewal notes, for at least five years unless the property was sold prior to that time. When the Frankford note matured on August 12, 1984, Defendant FirstSouth agreed to extend the maturity date to August 12, 1985, and then subsequently to August 12, 1986. However, in addition to the interest being charged by Defendant FirstSouth, Defendant FirstSouth charged "extension fees" in the amount of $450,000 for each extension of the maturity date of the note. Additionally, Defendant First South required Plaintiff to execute promissory notes in the amount of $3,000,000 and in the amount of $4.6 million dollars and charged other fees in addition to the extension fees, all of which fees are in fact interest which render the loan transactions usurious.

10. Defendant FirstSouth further represented to Plaintiff that under the terms of the loan agreements it

would allow Plaintiff to draw down funds to make improvements to the property and would loan Plaintiff additional funds to carry the interest on the notes and would renew the notes until such time as the property could be sold. From December 1984 to August 1985, Plaintiff drew down approximately $3,000,000 to make improvements to the property, including construction of roads and thoroughfares, installation of sewer lines, and other improvements for the benefit of both Plaintiff and Defendant FirstSouth. Such improvements were made with the consent of FirstSouth. In accordance with such agreement, as shown above, FirstSouth renewed the note on two different occasions to extend the maturity date to August, 1986. However, in August, 1986 Defendant FirstSouth refused to renew the notes as it had represented it would, and has now demanded payment of the notes and has threatened to foreclose on the real property.

COUNT I.

USURY

11. Plaintiff alleges and incorporates herein by reference paragraphs 1 through 10 above.

12. With respect to the Rasor tract, Defendant FirstSouth has contracted for, charged or received interest in excess of twice the amount allowed by law, or alternatively, in excess of the amount allowed by law, by reason of the "commitment" fees, "origination" fees, other fees and "profit" received which are in reality compensation for the use of money. Accordingly, Plaintiff is entitled to recover from Defendant FirstSouth three times the amount of usurious interest contracted for, charged or

received by Defendant FirstSouth and return of all principal paid to FirstSouth and twice the amount of all interest charged or received, and its reasonable and necessary attorney fees as well as costs of suit, all of which exceed the minimum jurisdictional requirements of this Court. Alternatively, Plaintiff is entitled to recover three times the amount of usurious interest charged or received and its reasonable and necessary attorney fees.

13. Respecting the Frankford property, FirstSouth has contracted for, charged or received interest in excess of twice the amount allowed by law, or alternatively, in excess of the amount allowed by law, in contracting for a "profit participation," and in charging fees which are not reasonably related to the value of any services performed by Defendant. Accordingly, Plaintiff is entitled to the statutory penalties and recoveries at common law as outlined in paragraph 12 above.

COUNT II.

BREACH OF FIDUCIARY DUTY AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

14. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 10 above.

15. Alternatively, Plaintiff seeks a declaration that Defendant FirstSouth was in reality a partner with Coit Independence Joint Venture by reason of its profit sharing interest in the joint venture and by reason of the understanding of the parties that FirstSouth would act as the "financial partner" in the enterprise and the other co-venturers would act as the "service partners" to develop and market the property for resale at a profit to benefit all the venturers. As a partner, FirstSouth owes Plaintiff a fiduciary duty to deal with its partners in a manner that will not destroy or impair partnership assets. FirstSouth's failure to provide the agreed upon capital and operating contributions for the properties and to deal with its partners in a fair manner constitutes a breach of its fiduciary duty to Plaintiff and its implied duty of good faith and fair dealing.

16. As a direct and proximate result of the wrongful conduct of FirstSouth, Plaintiff has been damaged in an amount that exceeds the jurisdictional minimum of this Court.

WHEREFORE, Plaintiff respectfully requests that Defendant FirstSouth be cited to appear and answer and upon final hearing Plaintiff have judgment against FirstSouth in the amounts prayed for above, or alternatively, that Plaintiff have declaratory judgment, that the relationship between it and Defendant FirstSouth was that of partner or joint venturer and further declaration that any alleged note, deed of trust, guaranty or other document is unenforceable as a loan or guaranty against Plaintiff. Plaintiff further prays for its prejudgment and post-judgment interest as allowed by law, for damages on its usury claim according to the statute, its reasonable attorney fees, costs and such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

/s/ Paul E. Galvin by JLG
Jay L. Gueck
State Bar No. 08566800

Paul E. Galvin
State Bar No. 07601300
Of AKIN, GUMP, STRAUSS,
HAUER & FELD
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-4618
Telephone: (214) 969-2800
ATTORNEYS FOR
PLAINTIFF

VERIFICATION

THE STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared Charles C. Taylor, who being first duly sworn, upon his oath stated he is a Managing Joint Venturer of Coit Independent [sic] Joint Venture, that he has authority to execute this Verification, that he has knowledge of the facts set forth in paragraphs 1-13 of Plaintiff's Original Petition, and that the facts stated therein are true and correct.

/s/ Charles C. Taylor
Charles C. Taylor

SUBSCRIBED AND SWORN TO BEFORE ME this 24th day of October, 1986.

/s/ Sandra L. Howerton
Notary Public in and
for the State of Texas

Sandra L. Howerton

My commission expires:
August 29, 1989

NO. 86-14274

COIT INDEPENDENCE JOINT VENTURE,	)	IN THE
	)	DISTRICT
Plaintiff	)	COURT OF
	)	
VS.	)	DALLAS
	)	COUNTY, TEXAS
FIRSTSOUTH, F.A.,	)	
	)	95TH JUDICIAL
Defendant	)	DISTRICT

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, FIRSTSOUTH, F.A. ("FIRSTSOUTH"), Defendant in the above entitled and numbered cause, and for answer to Plaintiff's Original Petition would respectfully show the Court as follows:

I.

FIRSTSOUTH avails itself of its rights under Rule 92, Tex. R. Civ. P., to file a General Denial and deny all, each and every allegation contained in Plaintiff's Petition and demand strict proof thereof.

WHEREFORE, PREMISES CONSIDERED, FIRSTSOUTH prays for judgment of the Court that Plaintiff take nothing by its suit, and that FIRSTSOUTH go hence with its costs without day, and for such other and further relief at law or in equity as to which it may show itself entitled.

Respectfully submitted,
VINSON & ELKINS

By: /s/ Kenneth E. John, Jr.
State Bar No. 10677000
2020 LTV Center
2001 Ross Avenue
Dallas, Texas 75201-2916
(214) 979-6601

ATTORNEY FOR FIRSTSOUTH, F.A.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the above and foregoing document was sent by Certified Mail, Return Receipt Requested, to counsel of record, as follows, on this — day of December, 1986.

/s/ Kenneth E. Johns, Jr.
Kenneth E. Johns, Jr.

CERTIFIED MAIL

Mr. J. L. Gueck
Akin, Gump, Strauss,
Hauer & Feld
4100 First City Center
1700 Pacific Avenue
Dallas, TX 75201-4618

Mr. Paul E. Galvin
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4100 First City Center
1700 Pacific Avenue
Dallas, TX 75201-4618

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Coit Independence Joint Venture, Plaintiff,	)	
v.	)	Civil Action No. 3-86-3185-R
FIRSTSOUTH, F.A., Defendant.	)	

MOTION OF FSLIC TO
DISMISS PLAINTIFF'S COMPLAINT

The Federal Savings and Loan Insurance Corporation ("FSLIC"), an agency of the United States Government, in its capacity as Receiver for FIRSTSOUTH, F.A. ("FIRSTSOUTH") hereby moves to dismiss the complaint brought against it in this matter by plaintiff pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In support of this motion, FSLIC states as follows:

1. In December 4, 1986, the Federal Home Loan Bank Board ("Bank Board") appointed the FSLIC Receiver for FIRSTSOUTH pursuant to 12 U.S.C. § 1464(d)(6)(A) and 12 U.S.C. § 1464(d)(6)(B)(i). The grounds for appointment of the Receiver included that the liabilities of FIRSTSOUTH exceeded its assets. A copy of the Resolution of the Bank Board appointing FSLIC as Receiver is attached hereto as Exhibit A.

2. As Receiver, FSLIC is required to collect all obligations and money due the association and to discharge

and pay off any claims of any nature against the assets or property of the association. 12 U.S.C. § 1729(b)(1)(A) and (B), 12 C.F.R. 547-549. By operation of law, FSLIC as Receiver is a party to this action. 12 C.F.R. § 547.7.

3. As as a result of FSLIC's appointment as Receiver for FIRSTSOUTH, FSLIC has the exclusive power to determine all claims against FIRSTSOUTH, and all claims, including litigation pending against FIRSTSOUTH, must be referred to a comprehensive administrative claims procedure established under federal regulations and statutes. 12 C.F.R. § 549; *North Mississippi Savings & Loan Ass'n. v. Hudspeth*, 756 F. 2d 1096 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 790 (1986).

4. The statute which authorizes the Bank Board to appoint FSLIC as Receiver also prohibits any judicial interference with the administrative claims procedure. Under 12 U.S.C. § 1464(d)(6)(C), no court has jurisdiction to hear claims against an association in receivership except appeals from decisions of FSLIC which have first been appealed to the Bank Board in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

5. FSLIC's memorandum of law in further support of this motion will be filed in accordance with a briefing schedule set by this Court.

WHEREFORE, FSLIC as Receiver respectfully requests this Court to dismiss plaintiff's complaint.

Respectfully submitted,

By: /s/ J. K. Ivey
One of the Attorneys for
the Federal Savings and
Loan Insurance
Corporation as Receiver
for FIRSTSOUTH, F.A.

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Of Counsel:

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William K. Black
Thomas J. Segal
John Beaty
Federal Home Loan
Bank Board
Office of General Counsel
1700 G Street, N.W.
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Motion of FSLIC as Receiver to Dismiss Plaintiff's Complaint has been delivered by messenger this the 19th day of February, 1987, to all attorneys of record.

/s/ J. K. Ivey

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE,	)	
Plaintiff,	)	
v.	)	CA 3-86-3185-R
FIRSTSOUTH, F.A.,	)	
Defendant.	)	

ORDER

(Filed February 25, 1987)

In *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 106 S.Ct. 790 (1986), the Fifth Circuit held that the FSLIC has the exclusive power to determine *all* claims—including those raised in litigation—against the FSLIC, as receiver for a savings and loan association. This Court, as it must, followed *Hudspeth* in *Glen Ridge I Condominiums v. FSLIC*, CA 3-85-1709-R (N.D. Tex. Sept. 27, 1985), and Judge Fish did the same in *Zervas v. Falkner*, CA 3-84-0238-G (N.D. Tex. Sept. 30, 1985).

The FSLIC has been appointed as receiver for FirstSouth. Accordingly, the Motion of the FSLIC to Dismiss the Plaintiff's Complaint is GRANTED.[1]

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[1]This order is being entered *before* the expiration of the twenty (20) day period for the plaintiff's response—in an attempt to save expense and attorneys fees for the plaintiff in

(Continued on following page)

SIGNED this 25th day of February, 1987.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE

(Continued from previous page)

filing a needless response—since any attempt to obtain a reversal of *Hudspeth* must be addressed to the Fifth Circuit. However, if the plaintiff does wish to file a reply to the motion to dismiss, the reply will be treated as a motion for reconsideration of this Order.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE,	)	
Plaintiff,	)	
vs.	)	CA No. 3-86-3185-R
FIRSTSOUTH, F.A.,	)	
Defendant.	)	

COIT INDEPENDENCE JOINT VENTURE'S MOTION FOR RECONSIDERATION AND RESPONSE TO MOTION OF FSLIC TO DISMISS

(Filed March 18, 1987)

Coit Independence Joint Venture ("Coit"), plaintiff herein, hereby moves the Court to reconsider its Order of February 25, 1987 dismissing the Plaintiff's Complaint and responds to the Motion of FSLIC to Dismiss Plaintiff's Complaint on the grounds and for the reasons set forth below:

I.

1. Removal of this action was not properly effected prior to February 25, 1987, the date on which this Court entered its Order dismissing this action. The defects in the removal are adequately explained in Coit's Motion to Vacate filed herein on March 10, 1987, and in Coit's Motion for Removal filed herein on March 13, 1987, which Motions are incorporated herein by reference. Therefore, for the reasons stated in these prior Motions, Coit requests that the Court reconsider and vacate its Order of February 25, 1987.

II.

2. Coit agrees with the recitation of facts contained in paragraphs 1 and 2 of the Motion of the Federal Savings and Loan Corporation ("FSLIC") to Dismiss Plaintiff's Complaint. Coit, however, vigorously contests the significance FSLIC attached to those facts and FSLIC's interpretation of the law applicable to this Court's jurisdiction.

3. FSLIC contends in its Motion that FSLIC (more properly the Federal Home Loan Bank Board, hereinafter referred to as "FHLBB") has exclusive power to adjudicate all litigation pending against FirstSouth and that all such litigation must be referred to the FHLBB pursuant to the claims process set forth in 12 C.F.R. § 549 *et seq.* in accordance with the procedures established by the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (the "APA"). This contention is founded solely on the language of 12 U.S.C. § 1464(d)(6)(C) as interpreted in *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 790 (1986). The premise of FSLIC's contention is the assertion that no court has original jurisdiction of claims against a savings and loan that has been placed in receivership.

4. The most recent pronouncement of a U.S. Court of Appeals on this issue, however, severely undermines the authority of *Hudspeth* and conclusively refutes the proposition that the statutory scheme delineating FSLIC's authority as a receiver was intended to grant FSLIC adjudicatory power over such claims against a savings and loan in receivership. *Morrison-Knudsen Co. Inc. v. CHG*

International, Inc., No. 86-2063, slip op. (9th Cir. February 25, 1987) (available March 2, 1987, on Lexis, Genfed library, US App file). A copy of this opinion is attached as Appendix A to the Brief in Support of this Motion. Consequently, the statutory scheme does not deprive this Court of jurisdiction over Coit's claim against First South.

5. In any event, *Hudspeth* is factually distinguishable from the instant case.

III.

6. Alternatively, under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), *Hudspeth's* interpretation of 12 U.S.C. § 1464 violates Article III of the U.S. Constitution by vesting judicial power over a claim arising under state law in an administrative body, namely, the FHLBB. *Glen Ridge I Condominiums, Ltd. v. FSLIC*, No. 05-85-00873-CV, slip op. (Tex. Civ. App.—Dallas, December 30, 1986). A copy of this opinion is attached to the Brief as Appendix B. Thus, while the *CHG* court saw fit to avoid the constitutional issue by rejecting *Hudspeth*, if this court finds itself bound to *Hudspeth's* interpretation of the statutory scheme, this Court may and should nonetheless exercise jurisdiction over this matter by following *Northern Pipeline* and *Glen Ridge*. *Hudspeth* is therefore distinguishable since no constitutional issue was raised before the Fifth Circuit.

IV.

7. In the second alternative, *Hudspeth's* interpretation of the statutory scheme deprives Coit of its Seventh Amendment right to a trial before a jury. Shifting this

action to the administrative track under the APA limits federal court jurisdiction to, at best, a review of the FHLBB's ruling by a U.S. Court of Appeals to determine if the ruling is supported by "substantial evidence." *See* 12 U.S.C. §§ 1464(d)(7)(A)-(B); 5 U.S.C. § 706(2)(E); *CHG*, slip op. at 27, n. 5. Thus, no jury trial, or even an evidentiary hearing, would be available to Coit at any stage of the administrative process. *Id.* The Seventh Amendment protects Coit from the evidentiary limits of so summary a process.

V.

THEREFORE, Coit moves this Court to reconsider and vacate its order of February 25, 1987 dismissing this action and to deny FSLIC's Motion to Dismiss.

Respectfully submitted,

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Paul E. Galvin
State Bar No. 07601300
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ATTORNEYS FOR PLAINTIFF COIT INDEPENDENCE JOINT VENTURE

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion and Response has been served upon all counsel of record in

accordance with the Federal Rules of Civil Procedure on this 18th day of March, 1987.

/s/ Jeffrey C. Glass

CERTIFICATE OF CONFERENCE

I certify that, pursuant to Local Rule 5.1(a), on March 12 and 13, 1987, I conferred with Mr. J.K. Ivey, counsel for Defendant herein, concerning the foregoing Motion and he informed me that he would oppose it.

/s/ Jeffrey C. Glass

jcg.docs.MotRecon

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE, Plaintiff,	)	
vs.	)	CA NO. 3-86-3185-R
FIRSTSOUTH, F.A., Defendant.	)	

NOTICE OF APPEAL

(Filed March 27, 1987)

Notice is hereby given that Coit Independence Joint Venture, plaintiff in the above-named action, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order dismissing plaintiff's action, entered herein on the 25th day of February, 1987.

Respectfully submitted,

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VENTURE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this 27th day of March, 1987.

/s/ Paul E. Galvin

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE,	)	
Plaintiff,	)	Civil Action
v.	)	No. 3-86-3185-R
FIRSTSOUTH, F.A.,	)	
Defendant.	)	

FSLIC'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION

(Filed April 7, 1987)

The Federal Savings and Loan Insurance Corporation ("FSLIC"), as Receiver for FirstSouth, F.A. ("FirstSouth"), submits this its Response to Plaintiff's March 18, 1987, Motion for Reconsideration and Response to Motion of FSLIC to Dismiss.

Background

On February 19, 1987, FSLIC filed its Motion to Dismiss Plaintiff's complaint for lack of subject matter jurisdiction on the ground that claims such as those raised in Plaintiff's complaint rest exclusively with FSLIC and its supervisory authority, the Federal Home Loan Bank Board ("Bank Board"). 12 U.S.C. § 1464(d)(6)(C); 12 U.S.C. § 1929(b)(1)(A) and (B). *See: North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985).

On February 25, 1987, this Honorable Court entered its Order granting FSLIC's Motion to Dismiss based on

Hudspeth and this Court's prior opinion in *Glen Ridge I Condominiums v. FSLIC*, CA3-85-1709-R (N.D. Tex., September 27, 1985). This Honorable Court noted that:

> 1. This Order is being entered *before the expiration* of the twenty (20) day period for the plaintiff's response—in an attempt to save expense and attorneys fees for the plaintiff in filing a needless response—since any attempt to obtain a reversal of *Hudspeth* must be addressed to the Fifth Circuit.

Order, p. 1.

On March 18, 1987, Plaintiff filed its Motion for Reconsideration and Response to Motion of FSLIC to Dismiss, citing the following non-Fifth Circuit authorities as grounds for reconsideration: *Morrison-Knudsen Co., Inc. v. CHG International, Inc.*, No. 86-2063, Slip Op. (9th Cir., February 25, 1987), and *Glen Ridge I Condominiums, Ltd. v. FSLIC*, No. 05-85-00873-CV, Slip Op. (Tex. Civ. App.-Dallas, December 30, 1986). Plaintiff's motion is procedurally and legally in error.

Plaintiff's Motion is Untimely

This Honorable Court's Order of Dismissal was entered on the Court's docket pursuant to Federal Rules of Civil Procedure 58 and 79(a) on February 25, 1987. An order dismissing a plaintiff's complaint without leave to amend is a dispositive trial court determination of law. *Stevenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 811 (9th Cir. 1981). Federal Rule of Civil Procedure 59(e) provides:

> A motion to alter or amend judgment shall be served not later than ten days after entry of judgment.

Plaintiff's Motion for Reconsideration was not filed until March 18, 1987, some twenty-one days after this

Court's entry of judgment, and well beyond the time limit prescribed by Rule 59(e). Rule 6(b) of the Federal Rules of Civil Procedure prohibits enlargement of this time period, and the Court cannot allow such time period to be circumvented. *Armstrong v. Tennessee Valley Authority*, 536 F.Supp. 9, 11 (E.D. Tenn. 1980).

As explained by the court in *Roque v. City of Redlands*, 79 F.R.D. 433 (C.D. Cal. 1978):

> . . . Rule 59(e) of the Federal Rules of Civil Procedure permits the court to alter or amend a judgment. While Rule 59 motions are usually utilized following a trial, such motions are also permissible in cases, such as this, in which the court enters an order of dismissal. Rule 59(e) specifies, however, that motions to alter or amend a judgment 'shall be served not later than ten days after entry of the judgment.'
>
> In this case, the order of dismissal which Plaintiff seeks to alter was entered on June 14, 1987 . . . the Plaintiff served a motion [to amend] fourteen days after the entry of the order . . . For this reason, the Court must deny the motion to alter the judgment insofar as it rests upon Rule 59(e).

79 F.R.D. 433 at 435. *See accord: Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1112 (7th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 1758 (1985).

While Plaintiff's Motion to Reconsider is not couched as a Rule 60 motion for relief due to mistake, inadvertence, excusable neglect, etc., it is important to note that such a motion would be inappropriate in any event. Rule 60 may be used to vacate an order of dismissal for lack of subject matter jurisdiction only on narrow grounds and upon a showing of exceptional circumstances. *Andrews v. Heinhold Commodities, Inc.*, 791 F.2d 1334 (7th Cir. 1985).

Rule 60(b) was not designed to supersede the normal and ordinary channels of appellate relief. *Loucke v. U.S.*, 21 F.R.D. 305 (D.C. N.Y. 1957). It cannot be used as a substitute for appeal, and absent exceptional and compelling circumstances, a party will not be granted leave from a judgment even though relief from the judgment might have been obtained had an appeal been taken. *Roque v. City of Redlands*, 79 F.R.D. 433, 435 (C.D. Cal. 1978). A party may not avoid the time limitations of Rule 59 by filing a Rule 60 motion for review of judgment. *U.S. v. Hall*, 463 F.Supp. 787 (D.C. Mo. 1978) *aff'd*, 588 F.2d 1214 (8th Cir. 1978).

As the foregoing authorities indicate, the procedural delinquency of Plaintiff's Motion to Reconsider prevents it from being considered by this Honorable Court.

This Honorable Court is Bound to Follow Fifth Circuit Precedent

Notwithstanding the foregoing, Plaintiff's Motion for Reconsideration is legally inadequate because it requests this Court to vacate its order on the basis of rulings of other courts that directly contradict with prior Fifth Circuit precedent. As this Court correctly noted in its Order of February 25, 1987: "Any attempt to obtain a reversal of *Hudspeth* must be addressed to the Fifth Circuit."

A district court cannot shape decisional law by overruling circuit precedent because it lacks power to do so, and merely applies the law as it finds it. *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975); *Kennard v. United Parcel Service, Inc.*, 531 F.Supp. 1139 (D.C. Mich. 1982).

The rule of *stare decisis* in the Fifth Circuit is clear: No court is at liberty to alter the law of the circuit until the Supreme Court or the *en banc* circuit court so instruct. *U.S. v. Albert*, 675 F.2d 712 (5th Cir. 1982); *Howard v. Gonzales*, 658 F.2d 352 (5th Cir. 1981). Even if the Ninth Circuit's opinion in *Morrison-Knudsen Co., Inc. v. CHG International, Inc.* "conclusively refutes the proposition that the statutory scheme delineating FSLIC's authority as receiver was intended to grant FSLIC adjudicatory power over such claims," as argued by Plaintiff in its Motion for Reconsideration, this Honorable Court is bound to follow this Circuit's directives in *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), until such time, if any, that the Fifth Circuit *en banc* readdresses the question.

Plaintiff's reliance on *Glen Ridge I Condominiums, Ltd. v. FSLIC*, No. 05-85-00873-CV, Slip Op. (Tex. Civ. App. - Dallas, December 30, 1986) is even more misplaced. This Honorable Court is more than familiar with the history of the *Glen Ridge* case. *See: Glen Ridge I Condominiums, Ltd. v. FSLIC*, CA3-85-1709-R (N.D. Tex., September 27, 1985). A federal district court is not bound by *stare decisis* to follow state court interpretations of federal law. *Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072 (D. Utah 1981), *aff'd in part, rev'd in part*, 716 F.2d 1298 (10th Cir. 1983). Just as the decisions of another circuit cannot override the determinations of the Fifth Circuit, this Court may not be bound by the ruling of a state court of appeals concerning a question of federal law.

WHEREFORE, Defendant FSLIC prays that Plaintiff's Motion for Reconsideration and Response to Motion of FSLIC to Dismiss be denied.

Dated: April 6, 1987

Respectfully submitted,

By: J. K. Ivey
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CERTIFICATE OF SERVICE

The undersigned does hereby certify a true and correct copy of the foregoing document was forwarded to all counsel of record on this the 7th day of April, 1987.

/s/ J. K. Ivey.
J. K. Ivey

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENT JOINT VENTURE, Plaintiff,	)	
vs.	)	Case No. CA 3-86-3185-R
FIRSTSOUTH, F.A., Defendant.	)	

ORDER

(Filed April 9, 1987)

Plaintiff Coit Independent Joint Venture moves this Court to Reconsider and Vacate its Order of February 25, 1987 dismissing this action, and to Remand this action to state court. Upon consideration of the Motions, the Responses thereto, and all relevant authority, this Court is of the opinion that both of Plaintiff's Motions should be denied; it is therefore

ORDERED that Plaintiff's Motion to Reconsider and Vacate and its Motion to Remand shall be and hereby are DENIED, and it is further

ORDERED that the Court's Order of February 25, 1987 dismissing this action shall not be disturbed.

Signed this 9th day of April, 1987.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE

Certified a true copy of an instrument on file in my office on 5-6-87. NANCY HALL DOHERTY, Clerk, U.S. District Court, Northern District of Texas.

By /s/ Barbara Howell
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE, Plaintiff,	)	Civil Action No. 3-86-3185-R
vs.	)	
FIRSTSOUTH, F.A., Defendant.	)	

NOTICE OF APPEAL

(Filed April 23, 1987)

Notice is hereby given that Coit Independence Joint Venture, Plaintiff in the above-named action, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order dismissing plaintiff's action, entered herein on the 25th day of February, 1987, and the Order denying Plaintiff's Motion to Reconsider and Vacate and its Motion to Remand entered herein on April 9, 1987.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a copy of this document was served upon the attorneys of record for all parties in accordance with the Rules of Civil Procedure, on this 23 day of April 1987.

/s/ Paul Galvin

NOTICE OF APPEAL—Solo Page

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1218

COIT INDEPENDENCE JOINT VENTURE,

Plaintiff-Appellant,

versus

FIRSTSOUTH, F.A.,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas

(Filed February 10, 1988)

ORDER:

IT IS ORDERED that the motion of appellant to recall the Court's mandate is DENIED

IT IS FURTHER ORDERED that the motion of appellant to enlarge the time for the filing of a petition for rehearing and suggestion for rehearing en banc is DENIED

/s/ Sam Johnson
UNITED STATES CIRCUIT JUDGE
2-8-88

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 7, 1988

Mr. Robert E. Goodfriend
4100 First City Center
1700 Pacific Avenue
Dallas, TX 75201-4618

Re: Coit Independence Joint Venture,
v. Federal Savings and Loan Insurance
Corporation, as Receiver of
FirstSouth, F.A. No. 87-996

Dear Mr. Goodfriend:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk
/s/ Joseph F. Spaniol, Jr.

Supreme Court, U.S.
FILED
MAY 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER OF FIRSTSOUTH, F.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Has Congress granted FSLIC, as receiver, the exclusive authority to adjudicate the validity of state law causes of action asserted against failed savings and loan associations under a FSLIC receivership?

II. If Congress did give FSLIC authority to adjudicate state law causes of action asserted against failed savings and loan associations under a FSLIC receivership, would that grant of authority violate the mandate of separation of powers in Article III, § 1 of the U.S. Constitution?

III. Would requiring Petitioner to submit its claims against FirstSouth to FSLIC for adjudication deny Petitioner due process of law under the Fifth Amendment to the U.S. Constitution?

IV. Would requiring Petitioner to submit its claims against FirstSouth to FSLIC for adjudication deprive Petitioner of its right to a jury trial under the Seventh Amendment to the U.S. Constitution?

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No. 87-996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER OF FIRSTSOUTH, F.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Fifth Circuit is reported at 829 F.2d 563 (5th Cir. 1987). The opinion ("Order") of the U.S. District Court has not been reported, and is reprinted in the appendix to the Petition for Certiorari. (P.A. 5-6).[1]

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[1] Citations to the appendix to the Petition for Certiorari will be in the form of "P.A. ___"; to the Joint Appendix, "J.A. ___"; to the record, "R. ___"; and to the appendix to this Brief, "B.A. ___"

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1987. (P.A. 8). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution

Article III, Section 1 of the United States Constitution
The Fifth Amendment to the United States Constitution
The Seventh Amendment to the United States Constitution

Statutes

12 U.S.C. § 1464(d)(6)(C)
12 U.S.C. § 1728(c)
12 U.S.C. § 1729(c)
12 U.S.C. § 1729(d)
12 U.S.C. § 1730(k)(1)

Regulations

12 C.F.R. § 549.4
12 C.F.R. § 569a.8

The text of the foregoing provisions, statutes and regulations is reprinted in the appendix hereto. (B.A. 41-46).

STATEMENT OF THE CASE

A. Statement of Facts

From 1983 to 1986, Petitioner, Coit Independence Joint Venture ("Petitioner" or "Coit") received loans from FirstSouth, F.A., a federal savings association ("FirstSouth") on two parcels of land, the Rasor Tract and the Frankford

Property.[2] Because Coit advised FirstSouth that it had a contract to resell the Rasor Tract for a $10 million profit, FirstSouth demanded from Coit, as a condition to making the $20 million dollar loan, both interest at the treasury bill rate plus 4.25% and a "profit participation interest." Coit agreed to these demands, and when the Rasor Tract was sold, repaid FirstSouth approximately $23 million, including a $2.2 million participation profit on a loan that was outstanding for only 72 days. Coit claimed in its petition filed in state court that the profit participation interest and other commitment and origination fees were in reality compensation for the use of money and therefore constituted usury under Texas law. Because the rate of interest charged was more than twice the amount permitted under Texas law, Coit sued for the return of the principal amount of the loan and for three times the amount of usurious interest charged.

Coit also received a loan on the Frankford property in the amount of approximately $30 million. In connection with this loan, FirstSouth contracted to receive, in addition to interest, a 25% "profit participation interest" in the Frankford property. FirstSouth also agreed to continue to renew the note for at least five years unless the property was sold prior to that time, and agreed to allow Coit to draw down funds to improve the property. In August of 1986, FirstSouth refused to renew the notes as it had promised, demanded payment of the notes, and threatened to foreclose on the property. In Count I of its state court petition, Coit sued for forfeiture of the principal and penalty damages for usury in connection with both the Rasor Tract and the Frankford property. In

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[2] Because this case involves the propriety of the district court's dismissal of Coit's state court claims after their removal to federal court, the facts discussed herein are derived from Coit's state court petition (J.A. 16-24) and not from any evidence presented in the courts below.

Count II of its petition, Coit alleged that FirstSouth was in reality Coit's partner with regard to the properties, and that its failure to provide capital and to deal with Coit in a fair manner constituted breaches of its fiduciary duty and its duty of good faith and fair dealing which damaged Coit in an amount in excess of the court's minimum jurisdictional limits. Coit also prayed for a declaratory judgment that any note, deed of trust, guaranty or other document in connection with the loan was unenforceable. (J.A. 16-24).

B. Proceedings in the Courts Below

On or about December 4, 1986, the Federal Home Loan Bank Board (the "Board" or "FHLBB") appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") receiver for FirstSouth pursuant to 12 U.S.C. § 1464(d)(6)(A) and 12 U.S.C. § 1464(d)(6)(B)(i), on the ground, *inter alia*, that FirstSouth's liabilities exceeded its assets. (J.A. 7-15). On December 31, 1986, FSLIC removed Petitioner's state court action to the United States District Court for the Northern District of Texas, pursuant to 12 U.S.C. § 1730(k)(1)(C) and 28 U.S.C. § 1441. (J.A. 3-7). The United States District Court had original jurisdiction of this action under 12 U.S.C. §1730(k)(1)(c) and 28 U.S.C. §§ 1331 and 1346.

On February 19, 1987, FSLIC moved the United States District Court to dismiss Petitioner's complaint, arguing that FSLIC had exclusive jurisdiction to adjudicate any and all causes of action against FirstSouth. (J.A. 27-29). FSLIC insisted that the federal district court had no jurisdiction to hear claims brought against FirstSouth, but that the sole recourse of a would-be litigant against an insolvent savings and loan association under a FSLIC receivership was to take its claim to FSLIC for initial adjudication, then to appeal that decision to the Board, and finally to appeal the Board's

decision to the federal courts pursuant to the appeal procedures dictated by the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (the "APA"). The district court granted FSLIC's motion to dismiss and entered an order on February 25, 1987, dismissing Petitioner's action. (J.A. 30-31). Thereafter, Petitioner filed a motion to reconsider (J.A. 32-36); such motion was denied by order of the district court dated April 9, 1987. (J.A. 45-46). Petitioner appealed from these orders under 28 U.S.C. § 1291 to the United States Court of Appeals for the Fifth Circuit. (J.A. 37-38; 47-48). The court of appeals affirmed the dismissal by the district court after denying Petitioner's request for an initial hearing *en banc*.

In its appeal, Petitioner argued that the Fifth Circuit's prior decision in *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986) ("Hudspeth") was erroneous in its conclusion that certain statutes and regulations governing the authority of FSLIC to act as receiver granted FSLIC exclusive jurisdiction over all claims against a failed savings and loan association. Petitioner also claimed that FSLIC's asserted jurisdiction was unconstitutional. The court of appeals summarily determined that it was bound by its prior decision in *Hudspeth*, and that Petitioner's constitutional claims were not ripe for resolution at this time. Petitioner thereafter filed a Motion to Recall Mandate and to Enlarge Time to Petition for Rehearing or Rehearing En Banc, which the court of appeals denied on February 8, 1988. (J.A. 49). On March 7, 1988, this Court granted a writ of certiorari in this case. (J.A. 50).

C. Subsequent Developments

On September 28, 1987, two weeks before the court of appeals issued its opinion in this case, Petitioner filed its proof of claim with FSLIC in order to meet a deadline that FSLIC had imposed for the filing of creditor claims against

FirstSouth. (B.A. 1-11). The claim was filed under protest "without waiving [Coit's] rights to have this case tried before a jury in federal district court." (B.A. 8). Six months later, FSLIC notified Petitioner that its proof of claim had been received and had been "retained for further review." (B.A. 12-13).

On October 9, 1987, ten days after Coit filed its proof of claim with FSLIC, FSLIC notified Coit that it was accelerating all indebtedness due FirstSouth and foreclosing on the Frankford Property (B.A. 15-26). Because judicial protection against foreclosure was unavailable under the *Hudspeth* doctrine,[3] Coit filed a Request for Expedited Relief with the Board seeking a stay of the foreclosure (B.A. 27-31). In response, FSLIC filed a motion to dismiss Coit's claim for expedited relief on the grounds that the notice of foreclosure had been withdrawn and the request for relief was therefore premature (B.A. 32-34). In its letter withdrawing the notice of foreclosure, the Substitute Trustee under the deed of trust, acting under instructions from FSLIC, "reserve[d] the right to repost the property for foreclosure." (B.A. 35). The Motion for Expedited Relief was thereafter dismissed without prejudice. (B.A. 38-39). As of May 5, 1988, no further proceedings have occurred in this case before FSLIC or the Board.

SUMMARY OF ARGUMENT

In an unprecedented bid for judicial power, FSLIC has asserted that all claims of whatever kind or amount brought against a savings and loan association under a FSLIC receivership must be adjudicated in a proceeding before FSLIC,

[3] *See FSLIC v. Hall Whispertree Associates*, 653 F. Supp. 148 (W.D. Tex. 1986).

instead of in a court of law. Yet the statutes and regulations upon which FSLIC relies for this extraordinary claim nowhere explicitly grant FSLIC adjudicatory power, nor is FSLIC empowered to create administrative tribunals for this purpose. Rather, the Fifth Circuit has inferred this authority from a few scattered words and phrases in statutes describing FSLIC's powers as receiver, even though those statutes can be read in a manner that would avoid the wholesale usurpation by FSLIC of large areas of federal and state court jurisdiction. The Fifth Circuit's interpretation of FSLIC's authority also ignores important decisions from this Court which provide valuable insights into the meaning of those statutes. Specifically, the statutory prohibition against actions by a court which would "restrain or affect" the functions or duties of a receiver, upon which FSLIC primarily relies, must be read in light of the common law. Under the common law, *in personam* actions for damages, like the one in this case, were allowed to proceed in courts other than the receivership court despite claims that they interfered with the receiver. *Morris v. Jones*, 329 U.S. 545 (1946); *Riehle v. Margolies*, 279 U.S. 218 (1928).

However, even if Congress could be said to have granted FSLIC the exclusive power to adjudicate creditor claims, the grant of such adjudicatory powers would create serious constitutional problems which are ripe for adjudication at this time. First, FSLIC's assertion of jurisdiction over all claims against failed savings and loan associations violates the mandate of separation of powers in Article III, § 1 of the U.S. Constitution contrary to this Court's opinion in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). By ousting the district courts of jurisdiction, and providing for only limited judicial review over FSLIC's decisions, the statutes as construed effectively withdraw from the

judicial province a wide range of claims that have historically been at the core of judicial power.

Secondly, requiring Coit to present its claims to FSLIC for determination would deny Coit due process under the Fifth Amendment to the U.S. Constitution. FSLIC as the single largest claimant of FirstSouth's assets, and as a litigant with substantial monetary claims against Coit, has a financial interest in minimizing or denying Coit's claims, and is therefore not an impartial, disinterested tribunal with respect to such claims. *See Ward v. Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

Finally, Coit is entitled to a jury trial on its claims in this action. Requiring it to have its claims determined by FSLIC in an agency proceeding would deprive it of its right to a jury trial under the Seventh Amendment to the U.S. Constitution.

ARGUMENT

I. The Federal Savings and Loan Insurance Corporation, as Receiver for a Failed Savings and Loan Institution, has not been Granted the Authority to Adjudicate State Law Causes of Action Against a Savings and Loan Association in Receivership.

The Fifth Circuit's decision in this case contains no independent analysis of FSLIC's alleged statutory authority to adjudicate creditor claims. Instead, the court relied entirely on its earlier decision in *Hudspeth* in sustaining FSLIC's position. As the court stated: "we have reaffirmed the *Hudspeth* decision several times and are clearly bound by it." 829 F.2d at 564. Petitioner will therefore direct all its arguments regarding FSLIC's claim to adjudicatory power to errors in the *Hudspeth* decision where the rationale for FSLIC's extraordinary assertion of authority is contained. It is Coit's

position that *Hudspeth* is seriously flawed, that its analysis of the powers of FSLIC as receiver of a failed savings and loan association is both inaccurate and incomplete, and that the statutory analysis arrived at in *Hudspeth* raises serious constitutional questions as to the validity of the statutes regulating FSLIC's power as receiver.

A. The Hudspeth Decision

Hudspeth stands for the proposition that creditor claims against a failed savings and loan association, whose assets have been taken over by FSLIC as receiver, must be adjudicated by FSLIC rather than the courts, subject to very limited judicial review in the courts under the APA. *Hudspeth* involved a suit filed by North Mississippi Savings & Loan Association ("North Mississippi") in Mississippi state court for a declaration that a compensation agreement with its former president, Hudspeth, either did not exist or was terminable. *Hudspeth*, 756 F.2d at 1099. Hudspeth counterclaimed for specific performance or damages for breach of contract. *Id.* Thereafter, North Mississippi became insolvent, and FSLIC was appointed receiver of the institution's assets. *Id.* FSLIC terminated the agreement with Hudspeth and stopped payments to him. *Id.* Hudspeth then filed an amended counterclaim joining as a party the new savings and loan created by FSLIC. *Id.* FSLIC removed the action to federal court and successfully moved to dismiss Hudspeth's claims on the grounds that FSLIC, as receiver, had exclusive original jurisdiction to adjudicate creditors' claims. The Fifth Circuit initially ruled against FSLIC.[4] However, on Motion for Rehearing, the court withdrew its first opinion, and issued

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[4] For the text of the original opinion in *Hudspeth*, *see* Petition for Writ of Certiorari, No. 85-294, at 5-7, App. B.

a revised opinion upholding the dismissal of Mr. Hudspeth's complaint. *Id.* at 1099.[5]

The Fifth Circuit's ruling in *Hudspeth* was based on three grounds. First, the Court relied on 12 U.S.C. § 1729(d) which provided FSLIC as receiver with power to "settle, compromise, or release claims . . . subject only to the regulation of the [Board]." Second, the Fifth Circuit relied upon 12 U.S.C. § 1464(d)(6)(C), which provides in pertinent part that "no court may . . . except at the instance of the [Board], restrain or affect the exercise of powers or functions of a conservator or receiver." Finally, the court fortified its decision by reference to certain regulations adopted by the Board concerning procedures for FSLIC's payment of creditor claims. Under these regulations, FSLIC gives notice to creditors to present their claims, and then may disallow claims "not proven to its satisfaction." 12 C.F.R. §§ 569a.8, 549.4. The court concluded that these regulations reinforce the view that FSLIC is empowered to determine the validity of claims as part of its receivership function. Underlying all of the court's analysis was the concern that allowing judicial resolution of creditor claims would "delay the receivership function of distribution of assets," and that "FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation." 756 F.2d at 1102. The court found such a delay to be a "restraint" within the meaning of the statute, and contrary to "the overriding Congressional purpose of expediting and facilitating FSLIC's task as receiver." *Id.*

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[5] *See* T. Pfeiler, *FSLIC Adjudication of Claims Against Receiverships: Has the Search for Efficiency Lost Sight of Due Process?*, 53 Legal Bulletin 433, 439, 471-475 (Sept. 1987) (discussing the motion for rehearing in *Hudspeth*, and publishing text of original opinion.).

B. The Hudspeth Case Was Incorrectly Decided.

Since *Hudspeth* was decided, the Ninth Circuit has handed down its decision in *Morrison-Knudsen Co. v. CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1986), *cert. pending, sub nom., FSLIC v. Stevenson Associates*, No. 87-451, 56 U.S.L.W. 3249 (Oct. 16, 1987). In *Morrison-Knudsen*, the court analyzed the same statutory framework involved in *Hudspeth*, and concluded that Congress did not provide or intend to confer exclusive adjudicatory power to FSLIC over creditors' claims. *Morrison-Knudsen* is therefore squarely contrary to the Fifth Circuit's holding in *Hudspeth*. While Petitioner will rely upon the arguments in *Morrison-Knudsen*, even *Morrison-Knudsen* does not fully express the deficiencies in the *Hudspeth* analysis.

1. ***The Power to Settle, Compromise, and Release Claims Does Not Constitute a Grant of the Power to Adjudicate to FSLIC.***

At the time of the *Hudspeth* decision, Section 406(d) of the National Housing Act, 12 U.S.C. § 1729(d), provided in pertinent part as follows:

> In connection with the liquidation of insured institutions, the Corporation [FSLIC] shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board . . . .

In the federal district court, FSLIC, in its Memorandum in Support of its Motion to Dismiss, (R. 72), emphasized the language "subject only to the regulation of the Federal Home

Loan Bank Board," thereby seeming to imply that its powers as receiver were subject only to review by the Board. A similar inference seems to have been drawn by the Fifth Circuit in *Hudspeth*. 756 F.2d at 1101. However, such language merely modifies the grant of specific powers to FSLIC, such as the power to "settle, compromise, or release claims." As the court in *Morrison-Knudsen* pointed out, the power to settle, compromise, or release claims "strongly suggest the power of the other party to take the dispute to court." *Morrison-Knudsen*, 811 F.2d at 1219. Simply stated, if FSLIC had been granted the power to adjudicate claims with the force of law, why would it need the power to compromise or settle such claims? The power to compromise or settle claims is inconsistent with the power to adjudicate them.

Furthermore, the position taken by the Fifth Circuit in *Hudspeth* is less consistent with the statutory language than a position which permits creditor claims to be decided in the first instance in the courts. *Hudspeth* concluded that any action before the Board is subject to judicial review under the APA. However, the language "subject *only* to the regulation of the Federal Home Loan Bank Board" (emphasis added), if interpreted to include the power to determine the validity of claims, would also preclude judicial review of FSLIC's administrative decisions even under the APA. Thus, *Hudspeth* is internally inconsistent. Either the power to adjudicate is included within Section 1729(d) and is subject *only* to review by the Board, or it is a power *not* included within the scope of Section 1729(d), in which event it may be exercised by a court. *Hudspeth* attempts to achieve a middle position whereby it concludes that FSLIC has the exclusive power to adjudicate the validity of creditor claims, yet permits limited review by the courts. Such a position is simply not consistent with the statutory language.

A careful reading of the statute shows that the power to adjudicate is simply not one of the powers encompassed within Section 1729(d). Under that provision, the Board's exclusive regulatory authority pertains to (1) the power to carry on the business of and to collect all obligations to the insured institution, (2) the power to settle, compromise or release claims, and (3) the power to do all other things that may be necessary in connection "therewith," i.e., in connection with the previously enumerated powers. Because the power to adjudicate the validity of claims is not specifically mentioned in Section 1729(d), and is not a power that is necessary to the performance of the enumerated functions, Section 1729(d) does not preclude the courts from hearing creditor claims against an insolvent savings and loan institution.[6]

2. The Fifth Circuit Has Misinterpreted the "Restrain or Affect" Language in 12 U.S.C. § 1464(d)(6)(C).

Section 5(d)(6)(C) of the Homeowner's Loan Act of 1933, 12 U.S.C. § 1464(d)(6)(C) states in pertinent part as follows:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or except at the instance of the Board, *restrain or affect* the exercise of powers or functions of a conservator or receiver. (Emphasis added).

The Fifth Circuit held in its *Hudspeth* decision that judicial resolution of creditors' claims would cause a "restraint" on the exercise of the receiver's powers by delaying the distribution of assets. The court reasoned that until the termination

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[6] The power to collect all obligations of the insured institution obviously cannot be read as granting FSLIC the power to decide the validity of its own claims; it merely grants FSLIC the power to pursue collection efforts.

of parallel litigation on the validity of creditors' claims, FSLIC would not be able to determine how much to pay other claimants:

> [R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: the FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as receiver, such a delay is a "restraint" within the scope of the statute.

756 F.2d at 1102.

This interpretation of the "restrain or affect" language is wholly inconsistent with the principles governing common law receiverships, and mistakenly assumes that the receiver's distribution of assets must await the judicial adjudication of creditor claims.

a. *The Fifth Circuit's Interpretation of "Restrain or Affect" is Contrary to the Concept of "Restraint" in Common Law Receiverships.*

The "restrain or affect" language of Section 1464(d)(6)(C) was added to the Homeowners Loan Act of 1933 by the Financial Institutions Supervisory Act of 1966.[7] When the statute was enacted, the prohibition against interference with or restraint upon the functions of receivers, and what constituted such interference or restraint, were well established concepts at common law.

"The starting point in every case involving consideration of a statute is the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). The Fifth Circuit should have

[7] P.L. 89-695.

interpreted the words "restrain or affect" in a manner consistent with their common law origins because nothing in the legislative history of the statute indicates any Congressional intent to give those terms any specialized meaning.[8] This and other courts have held that where there is no significant legislative history explaining the meaning of a term in a statute, and absent any indications to the contrary, it is fair to assume that Congress used a statutory term in its common law sense. *See Gilbert v. United States*, 370 U.S. 650, 655 (1962); *United States v. London*, 714 F.2d 1558, 1563 (11th Cir. 1983).

Under the common law, it is a general rule that one court cannot disturb property already in the custody of another court or its receiver. *Lion Bonding & Sur. Co. v. Karatz*, 262 U.S. 77, *mod. denied*, 262 U.S. 640 (1923); 65 Am. Jur. 2d Receivers § 174 and cases cited therein. Thus, where the property of a corporation is placed in the possession of a receiver appointed by a court, the property is *in custodia legis*, and hence, no action or proceeding can be maintained against the corporation the effect of which would be to interfere with or restrain the receiver's possession of the property. *Id.* Examples of actions which would interfere with the receiver's possession are ones seeking to recover posses-

[8] *See* S. Rep. No. 1482, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 3532-59; *see also* S. Rep. No. 1263, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Cong. & Admin. News 2530-41, for legislative history of the Bank Protection Act of 1968 which made Section 1464(d)(6)(C) applicable to state-chartered associations placed under FSLIC receivership by the FHLBB. *See also Summertree Venture, III v. FSLIC*, 742 SW2d 446 (Tex. App. — Houston [14th Dist.] 1987, writ denied), for a detailed discussion of the legislative history of the Act and related statutes.

sion of property in receivership[9]; ones for levy of execution upon property in receivership[10]; ones for trespass against the receiver[11]; ones to enjoin distribution of the receivership assets[12]; or to enjoin the receiver's management of the property.[13]

By contrast, it is well established that an action to prove the validity and amount of a claim, i.e., to liquidate a claim, is an *in personam* action which does *not* interfere with or restrain a receiver's possession of the receivership property. *Morris v. Jones*, 329 U.S. 545 (1946); *Riehle v. Margolies*, 279 U.S. 218 (1928); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 69 F.2d 60 (2d Cir. 1934).[14]

In *Morris v. Jones*, this Court, following its earlier decision in *Riehle v. Margolies*, held that an Illinois court appointing a liquidating receiver for an insolvent insurer was required under the Constitution to give full faith and credit to a creditor's judgment for tort damages rendered by a Missouri court against the debtor. The Court stated:

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[9] *See*, e.g., *Kneisel v. Ursus Motor Co.*, 147 N.E. 243 (Ill. 1925), *error dismissed*, 273 U.S. 772 (1926).

[10] *See*, e.g., *Clear Creek Power & Dev. Co. v. Cutler*, 245 P. 939 (Colo. 1926).

[11] *See*, e.g., *Greene v. Odell*, 60 N.Y.S. 346 (App. Div. 1899).

[12] *See* e.g., *Pennsylvania Steel Co. v. New York City Ry. Co.*, 229 F.120 (2d Cir. 1915).

[13] *See*, e.g., *In re Dawley*, 131 A. 847 (1926).

[14] The principles stated by these cases have been applied in federal bankruptcy cases, *see, e.g., Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 517 (2d Cir. 1975), and were recently reaffirmed by this Court. *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass'n*, 455 U.S. 691, 711 n. 19 (1982); *id.* at 718 (White J., concurring in the judgment).

> As pointed out in *Riehle v. Margolies*, the distribution of assets of a debtor among creditors ordinarily has a "two-fold aspect." It deals "directly with the property" when it fixes the time and manner of distribution. No one can obtain part of the assets or enforce a right to specific property in the possession of the liquidation court except upon application to it. But proof and allowance of claims are matters distinct from distribution. They do not "deal directly with any of the property." "The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam.*" *The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have.*

Id. at 548-49 (emphasis added) (citations omitted).[15]

This distinction between actions to enforce a right to specific property in the possession of the receivership court, and the mere liquidation of a claim which in no way "disturbs" the possession of the receivership court or "affects" title to the property, was well established when the "restrain or affect" language was inserted in the Financial Institutions Supervisory Act of 1966. Accordingly, it is reasonable to assume that what Congress intended by this language was to give FSLIC as statutory receiver the same protections from interference with its dominion and control over receivership property as a common law receiver could have obtained from

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[15] Early decisions of this Court also held that creditors of national banks in receivership could resort to state courts for adjudication of their claims and that such state court judgments were conslusive upon the bank receiver. *See National Bank of Commonwealth v. Mechanics Nat'l Bank*, 94 U.S. 437 (1877); *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 384, 20 L.Ed. 840 (1872).

a receivership court. Absolutely nothing in this language can be read to grant FSLIC the power to adjudicate creditor claims, or to insulate FSLIC from suits like this one which do no more than seek to establish the existence and amount of a claim through an *in personam* action against the insolvent debtor. Accordingly, the Fifth Circuit's reliance on Section 1464(d)(6)(C) as a basis for dismissing the instant case was erroneous because (1) such provision confers no adjudicatory powers on FSLIC, and (2) the instant case was a mere *in personam* action which did not interfere with the receiver's possession of the receivership property and thus did not "restrain or affect" FSLIC's actions as receiver.[16]

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[16] While the statute was designed to preserve the receiver's ability to manage *receivership* property, the district court's dismissal of Coit's claim that the note and deed of trust were unenforceable effectively allows the receiver to *enlarge* the receivership estate by foreclosing on Coit's property without any judicial review. FSLIC has asserted that it has this right under *Hudspeth* and section 1464(d)(6)(C). *See FSLIC v. Hall Whispertree Associates*, 653 F. Supp. 148 (W.D. Tex. 1986). However, FSLIC cannot be allowed to seize property held in the name of others merely under some claim of right without any prior or immediately subsequent judicial review. Such an application of *Hudspeth* would present serious constitutional problems of its own. *See Fuentes v. Shevin*, 407 U.S. 67 (1972).

The obvious answer is that section 1464(d)(6)(C) restrains courts from interfering *only* with a receiver's right to manage or distribute assets *held in the name* of the insolvent institution. The prohibition does *not* apply to assets held in the name of others to which the receiver merely has a claim of right. This is particularly true of a suit like Coit's for a declaratory judgment which, even if it applied to receivership assets, would not restrain or affect the receiver's ability to manage them.

Any broader interpretation of section 1464(d)(6)(C) would have the effect of turning FSLIC into an unstoppable "pac man" gobbling up other people's property while a powerless judiciary stands by. Given the enormous number of home mortgages held by savings and loan associations in this country, the *Hudspeth* doctrine, if not strictly confined to assets held in the name of the insolvent institution, presents a truly frightening prospect for millions of homeowners who might lose their homes if FSLIC suddenly felt "insecure" and decided to foreclose on their mortgages. Under the *Hudspeth* doctrine as presently applied, such homeowners could do nothing in the courts to stop such foreclosures even if they were totally unfounded.

b. *The Fifth Circuit Erroneously Assumed that the Receiver's Distribution of Assets Must Await Judicial Adjudication of Creditor Claims.*

The Fifth Circuit's conclusion in Hudspeth that all creditor claims must be adjudicated by FSLIC so as not to restrain or affect FSLIC's functions or powers as receiver is also erroneous because it is based on the mistaken belief that if creditor claims were allowed to be heard in the courts, FSLIC could not distribute any of the assets of the failed institution until all such claims were fully and finally adjudicated. 756 F.2d at 1102. The Fifth Circuit cites no authority for this proposition. Moreover, the Fifth Circuit's reasoning in this regard is directly contrary to this Court's decision in *Riehle v. Margolies*, where this Court specifically held that because proof and allowance of claims is distinct from distribution of assets, distribution need not be postponed pending the resolution of disputed claims in other courts. As this Court stated:

> The power to fix the time for distribution may include the power, in the exercise of judicial discretion [of the receivership court], to decline to postpone distribution awaiting disposition of litigation in another court over a contested claim.

Id. 279 U.S. at 224. *See also Pennsylvania Steel Co. v. New York City Ry. Co.*, 229 F. 120 (2d Cir. 1915) (Plaintiff unsuccessfully sought an injunction to restrain a receiver from distributing the assets of an insolvent railroad pending the resolution of plaintiff's damage claim in another court.).

Accordingly, the Fifth Circuit's assumption that FSLIC could not make any distribution of receivership assets pending the resolution of claims in parallel litigation is unfounded. The decision to distribute or not to distribute the receivership assets before the validity of all creditors' claims has been finally determined is a decision which is entirely *voluntary* on the part of the receiver; it is not a decision which is taken away from the receiver merely because an *in personam* action for damages or for a declaratory judgment is pending in court which might make it more difficult to determine the amount to be distributed to other claimants. Section 1464(d)(6)(C) is a species of anti-injunction statute which operates only to prevent courts from issuing *coercive judicial decrees* such as injunctions, writs of attachment, writs of sequestration or garnishment; or from asserting *in rem* or *quasi-in rem* jurisdiction, where such actions would interfere with the receiver's freedom to manage or distribute the receivership assets. The mere pendency of an *in personam* action for damages and/or declaratory relief in another court against the insolvent debtor in no way restrains or affects the receiver's freedom to manage or distribute the receivership property under his control.

The Fifth Circuit's assumption that distribution of assets would be delayed by judicial resolution of claims is also inconsistent with the actual practice of receivers for financial institutions. This same problem has arisen in the context of FDIC receiverships over banks, in which banks are frequently liquidated and their assets distributed in a matter of days through the use of a purchase and assumption transaction. *See* Note, *Creditors' Remedies Against the FDIC as Receiver of a Failed National Bank*, 64 Tex. L. Rev. 1429, 1432

(1986).[17] In such situations, distribution of the receivership assets is not delayed even though the judicial determination of the validity of claims may not occur until many months or years after the assets are distributed. If, at a later date, a court determines that the FDIC has wrongfully denied payment of a claim, the FDIC is ordered to pay such claim from its general funds even though all the assets of the failed institution have been distributed. *See First Empire Bank v. FDIC*, 572 F.2d 1361, 1371 (9th Cir. 1978), *cert. denied*, 439 U.S. 919 (1978); Note *supra*, 64 Tex. L. Rev. at 1438.[18]

c. The Fifth Circuit's Interpretation of the "Restrain or Affect" Language is Logically Flawed.

Even if distribution of the institution's assets would in fact be delayed during the pendency of litigation in the courts to determine the validity and amount of creditors' claims, the same type of delay would inevitably be caused by the receiver's own suits to enforce claims of the receivership estate

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[17] The purchase and assumption transaction is also used by FSLIC for insolvent savings and loan institutions. *See* T. Pfeiler, *supra*, 53 Legal Bulletin 433, 441-442 (1987).

[18] Interim distributions are also made by bankruptcy courts. For example, section 502(c)(1) of the Bankruptcy Code authorizes bankruptcy courts to estimate the value of certain contingent or unliquidated claims for the purpose of making interim distributions. *See, e.g., In Re Lane*, 68 B.R. 609, 611 (Bankr. D. Haw. 1986) (estimation of claims against debtor need not await judicial resolution of claim on appeal); *see also Bittner V. Borne Chemical Co.*, 691 F.2d 134, 135-36 (3d Cir. 1982) (method of estimation of claims by and against debtor). There is no reason why FSLIC as receiver could not make interim distributions using the same procedure. Similarly, as indicated by the proof of claim form supplied by FSLIC in this case, FSLIC's own priority rules comtemplate interim distributions. *See* B.A. at 8, ¶ I. *See also* 12 C.F.R. § 549.5-1, and 12 C.F.R § 549.4(d), which allows creditor claims to be paid by the receiver "from time to time, to the extent funds are available, in such manner and amounts as the Board may direct." *See also* 12 U.S.C. § 194 (1982).

in court. Furthermore, delay would also result from the adjudication of creditor claims through the administrative process, including judicial review under the APA. Under the review procedure adopted by the Fifth Circuit, there would first have to be a denial of the claims by FSLIC, then an appeal to the Board, and thereafter a further review by the courts under the APA. There is no reason to believe that such a process would be inherently faster than an initial review of the claims in the courts.[19] In fact, the regulatory scheme governing FSLIC's conduct as receiver provides that many claims must be brought within *three years* after the date of the receiver's appointment.[20] Inasmuch as the receiver was appointed in this case on December 4, 1986 (J.A. 7), such claims need not be made until December 4, 1989.

However, even if administrative adjudication followed by review in the courts would be faster than judicial resolution in the first instance, the receiver's ability to distribute the assets of the failed institution would still be significantly delayed by the administrative process. If distribution must await the disposition of claims, as the Fifth Circuit con-

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[19] If the experience of Mr. Hudspeth is any indication of the time required to complete the administrative process, then the administrative process may actually be much slower than adjudication in the courts. Mr. Hudspeth's "proof of claim" was initially filed with FSLIC on November 27, 1985, and FSLIC did not issue its preliminary decision (denominated a "Notice of Determination") until December 24, 1987, over two years later. See Brief of Amicus Curiae of Joseph M. Hudspeth in Support of Petitioner, pp. 6-8, 1A-4A, and 10A-11A. Inasmuch as the first step in the administrative process has taken over two years, the entire administrative process, which includes an appeal to the Board and then to the courts under the APA, could easily take much longer than initial adjudication in the courts.

[20] *See* 12 C.F.R. § 549.5(a) (share interest claims) and 12 C.F.R. § 549.5-1(c)(1) (claims with respect to demand accounts, savings deposits or savings accounts.)

tended, then even review by the courts under the APA would be a "restraint" contrary to the statute. In short, there appears to be no basis for the conclusion that initial review in the courts of the validity and amount of creditors' claims would restrain or affect the receiver's functions, but administrative resolution of the claims followed by judicial review under the APA would not.[21] As the Ninth Circuit stated in *Morrison-Knudsen*:

> If judicial review, which will delay — perhaps by years — the liquidation process, does not restrain or affect a receiver, then why does *initial* adjudication by a court of creditors' claims do so? *Hudspeth* provides no answer. Section 1464(d)(6)(C) does not speak in terms of the magnitude of such restraint or effect.

811 F.2d at 1216-17.

Finally, as pointed out by the court in *Morrison-Knudsen*, "Section 1464(d)6)(C) does not add to FSLIC's receivership powers; it simply prohibits courts from interfering with those powers, which FSLIC must derive from other statutory sources." 811 F.2d at 1217. Accordingly, to the extent that the Fifth Circuit relied upon Section 1464(d)(6)(C) in *Hudspeth* as a statutory basis for FSLIC's authority to adjudicate the validity of creditors' claims, such reliance was misplaced. A prohibition on interference by the courts is not an adequate substitute for an affirmative grant of adjudicatory power to FSLIC. As the court stated in *Morrison-Knudsen:* "FSLIC is unable to locate a single explicit indication in the legislative history or the language of its governing statutes that Con-

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[21] In the instant case, judicial adjudication would appear to have actually been faster. Coit's trial in state court was set for August, 1987, but as of May 5, 1988, the date of this Brief, the only decision that FSLIC has made is to retain Coit's claim for further review. (B.A. 47-48).

gress intended or expected FSLIC to adjudicate claims as part of its receivership functions." 811 F.2d at 1219. In the absence of an explicit legislative grant of such powers, this Court should avoid a construction of Section 1464(d)(6)(C) that prohibits resolution of creditor claims through traditional judicial channels.

3. *Board Regulations Regarding the Allowance or Disallowance of Claims do not Authorize Adjudication By FSLIC.*

In its Memorandum in Support of its Motion to Dismiss filed in the district court, FSLIC argued that "the Bank Board has adopted regulations establishing an administrative claims procedure under which FSLIC is expressly authorized to adjudicate the merits and priorities of creditors' claims against the failed association." (R 75-6). FSLIC relies upon 12 C.F.R. § 549.5-1(b)(2), which is applicable to federally chartered institutions such as FirstSouth, and provides in pertinent part as follows:

> The receiver shall approve any seasonably filed claim proved to its satisfaction. The receiver may wholly or partly disallow any claim of security, preference, or priority not so proved and shall notify the claimant of the disallowance and the reason therefor.

The Fifth Circuit in *Hudspeth* relied upon analogous regulations applicable to state-chartered institutions in concluding that FSLIC was "empowered to decide claims as part of its receivership functions." 756 F.2d at 1103. FSLIC's argument in this case, and the Fifth Circuit's reliance in *Hudspeth* on the Board regulations, are equally misplaced.

First, none of these regulations say anything about the adjudication of claims. Rather, what the regulations involve is

FSLIC's authority to either "approve" or "disallow" claims. These terms simply mean that FSLIC has the right in the first instance to decide whether to pay or refuse to pay a claim; they do not grant to FSLIC the power to enter a decree binding on all parties that determines the validity of a creditor's claim. As the Ninth Circuit stated in *Morrison-Knudsen*:

> FSLIC and the Board must be permitted to exercise some judgment before paying a claim against a thrift institution. Paying or refusing to pay, however, is not an adjudication of a claim. The language of the regulation does not purport to give FSLIC the power to enter conclusive factual and binding legal findings. FSLIC is no more an adjudicator under this regulation than is an insurance company authorized to "disallow" any claim not proved to its satisfaction and required to notify claimants thereof. The administrative process that the regulation prescribes authorizes FSLIC and the Board, by disallowance of a claim and notice to the claimant, to determine *whether a dispute exists*. It does not empower FSLIC to *resolve the dispute with the force of law*.

811 F.2d at 1218 (emphasis in original).

Second, FSLIC's authority to approve claims "proved to its satisfaction" and to disallow claims "not so proved" is an entirely subjective standard, and as such is contrary to the objective standards associated with an impartial adjudication. Assuming that, under *Hudspeth*, FSLIC's denial of a claim not "proved to its satisfaction" would be reviewable by a court under the substantial evidence standard, the reviewing court would find itself in the position of attempting to determine whether substantial evidence existed to support FSLIC's conclusion that the claim was not proved to FSLIC's satisfaction. Such a standard of review is almost meaningless. Thus,

the conclusion that this regulation was intended to confer adjudicatory power upon FSLIC leads to an absurd result. The better interpretation is that this language is consistent with FSLIC's role as insurer, i.e., FSLIC has the right in the first instance to decide whether to pay or refuse to pay a claim; and the Board can overrule FSLIC's decision just as the management of an insurance company can overrule the decision of a claims adjuster. However, if the ultimate administrative decision is not to pay, the resulting dispute must then be resolved by the courts.

Finally, Congress has given the FDIC the same power by statute that the Board has given FSLIC by regulation, namely the power to receive proof of creditors' claims and to pay only "such claims as may have been proved to [its] satisfaction." 811 F.2d at 1218; 12 U.S.C. §§ 193, 194, 1821(d). The Ninth Circuit stated that "the FDIC has never claimed, and no court has ever found, that these powers vest the agency rather than the district court with the ultimate power to adjudicate creditors' claims." 811 F.2d at 1218. Apparently, the FDIC has not sought the imaginative expansion of powers that FSLIC now claims.[22]

4. Other Provisions Contradicting Hudspeth

The Fifth Circuit's analysis in *Hudspeth* also ignored various statutory provisions which directly contradict the conclusion that FSLIC has the exclusive authority to adjudicate creditors' claims. First, in 12 U.S.C. § 1725(c)(4), Congress expressly included within FSLIC's general powers the capacity to "sue and be sued." This would tend to indicate that

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[22] *See also* T. Pfeiler, *supra*, 53 Legal Bulletin 433, 465-67, n.119 (1987), for a discussion of the similarities between the FDIC and FSLIC statutory receivership schemes.

Congress viewed FSLIC more as a potential litigant than as an administrative tribunal.

Second, 12 U.S.C. § 1730(k)(1) expressly includes, within the category of suits Congress expected FSLIC to litigate in court, an action against FSLIC "in its capacity as . . . receiver . . . which involves only the rights . . . of . . . creditors." This section states in pertinent part:

> Notwithstanding any other provision of law, . . . (B) any civil action, suit, or proceeding to which the Corporation [FSLIC] shall be party shall be deemed to arise under the laws of the United States. . . . *Provided*, That *any action, suit, or proceeding to which the Corporation is a party in its capacity as* conservator, *receiver*, or other legal custodian of an insured State-chartered institution and *which involves only the rights* or obligations *of* investors, *creditors*, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. (Emphasis added).

This proviso clause, which was intended to keep certain actions in state courts, indicates what type of suits Congress expected FSLIC to defend against in state courts. While this proviso technically applies only to state-chartered institutions, there is no indication that Congress intended to treat federally-chartered and state-chartered associations differently in this regard. *Morrison-Knudsen*, 811 F.2d at 1221.

Third, 12 U.S.C. § 1728(c) includes a statute of limitations applicable to depositors' actions against the agency. This section clearly indicates Congress' expectation that disputed claims would be adjudicated in court. *Morrison-Knudsen*, 811 F.2d at 1220 (citing *Jugum v. FSLIC*, 637 F. Supp. 1045, 1047 (W.D. Wash. 1986)). The court stated:

> [The] logical inference is that FSLIC may adjudicate neither *depositors'* nor *creditors'* claims. To assume that FSLIC must litigate *depositors'* claims, with which it has great expertise, but may adjudicate *creditors'* claims against the institution in receivership, as to which its expertise is much less, is not a rational interpretation of the statutory scheme.

Morrison-Knudsen, 811 F.2d at 1220 (emphasis in original). In fact, the legislative history indicates that the statute is intended to protect both depositors and creditors. *See* S. Rep. No. 536, 97th Cong., 2d Sess. 1 (1982).

Finally, the fact that the FDIC has been granted powers parallel to FSLIC, but has never attempted to assert the extraordinary powers which FSLIC now claims, further undermines FSLIC's position. In 1982, Congress extensively amended the statutory provisions regarding FSLIC's receivership functions in an act that clarified and augmented both FSLIC's and the FDIC's powers as receiver. *Morrison-Knudsen*, 811 F.2d at 1221, citing the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, 96 Stat. 1469 (1982) (the "Depository Institutions Act"). While FSLIC's asserted power to adjudicate could have been distinguished from the FDIC's, there was no such distinction; rather, the legislative history of these amendments indicates that the powers of FSLIC and the FDIC were to be equal. *See* S. Rep. No. 536, 97th Cong., 2d Sess. 7 (1982). Likewise, had Congress intended to include adjudication of creditors' claims in its augmentation of FSLIC's powers as receiver, it could easily have done so; yet there is absolutely no such indication

anywhere in the nearly 100 pages of amendments included in the Depository Institutions Act.[23]

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[23] Another problem with the Fifth Circuit's interpretation of FSLIC's enabling legislation is that it would cause unitary claims to be split up and tried in different forums, one administrative and one judicial. For example, if Coit's claims for usury and breach of fiduciary duty had been allowed to proceed in federal district court, then FSLIC's claim on the indebtedness allegedly owed FirstSouth would have been considered a compulsory counterclaim and all such claims (including Coit's defenses to FSLIC's suit on the debt) would have been tried in the same proceeding. This would have furthered the purposes behind Fed. R. Civ. P. 13(a), which is designed to prevent a multiplicity of actions. *See Southern Construction Co. v. United States*, 371 U.S. 57 (1962); *Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529 (5th Cir. 1974).

However, because of *Hudspeth*, Coit's affirmative claims and even its allegation that the note and deed of trust are unenforceable are switched to the administrative track, while FSLIC remains free to assert its claims on the debt in court. This is unfair for two reasons. First, it unjustly places defenses in a different forum from the claims to which they pertain. *See*, e.g., *Para-Chem Southern, Inc. v. M. Lowenstein Corp.*, 715 F.2d 128, 132 (4th Cir. 1983) (recoupment defense).

Secondly, this procedure prevents claims and counterclaims from being offset against one another, *see e.g., Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1 (1980); *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 366 (3d Cir. 1975), and permits FSLIC to use the administrative proceeding to create defenses in the judicial proceeding. For example, FSLIC can deny Coit's claims in the administrative proceeding, and when Coit tries to defend against FSLIC's deficiency claims in court, FSLIC can contend that Coit's defenses are barred by the administrative ruling. Such a procedure not only violates fundamental notions of fairness, it undermines sound principles of judicial economy by placing claims and defenses relating to a single transaction in different forums, and subjecting them to entirely different rules of evidence and procedure. Such a result is so unwieldy and so unjust that it should not readily be attributed to Congress.

C. This Court Should Construe the Applicable Statutes and Regulations to Avoid Serious Doubt of Their Constitutionality.

Should this Court construe the applicable statutes and regulations as a grant of exclusive power to FSLIC to adjudicate the validity of creditors' state law claims, as it did in *Hudspeth*, serious doubt as to the constitutionality of such statutes and regulations will be raised. As discussed more fully below, such a construction will require this Court to decide constitutional challenges based upon the separation of powers under Article III, Section 1, the due process clause of the Fifth Amendment, and the right to a trial by jury under the Seventh Amendment. Construing these statutes and regulations in such a manner will therefore conflict with a basic tenet of judicial restraint, which requires this Court to construe federal statutes in such a way "as to avoid serious doubt of their constitutionality." *Machinists v. Street*, 367 U.S. 740, 749 (1961); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979).

Where such "serious doubts" arise, a court should determine whether a construction of the statute is "fairly possible" by which the constitutional question can be avoided. *Street*, 367 U.S. at 749; *Crowell v. Benson*, 285 U.S. 22, 62 (1931). For this Court to construe the applicable statutes and regulations as granting FSLIC powers as a receiver and not as adjudicator is not only "fairly possible," it is a construction better supported by historic precedent and logic: the "entire statutory framework strongly suggests that Congress intended FSLIC to be a receiver, not an adjudicator." *Morrison-Knudsen*, 811 F.2d at 1219. Such a construction would also be consistent with this Court's obligation to construe statutes in a manner that preserves their constitutionality.

D. Petitioner's Constitutional Claims are Ripe for Adjudication.

The Fifth Circuit refused to consider Petitioner's constitutional arguments on the grounds that such arguments were "not ripe for resolution at this time." 829 F.2d at 565. The court reasoned that "FSLIC may allow all or some of Coit's claims, depriving Coit of standing and a grievance." *Id.*

The precise legal basis for the Fifth Circuit's ruling is unclear. Although the court held that Coit's claims were not "ripe" for resolution, its stated rationale for denying review was the possibility that Coit could be successful in the administrative process, a rationale that has traditionally been used to describe the requirement that administrative remedies be exhausted.[24]

Consideration of Coit's constitutional claims is not barred either by the exhaustion of administrative remedies requirement or by the doctrine of ripeness. The exhaustion requirement is not applicable here because "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."[25] As a result, constitutional challenges to a legislative scheme constitute a major exception to the exhaustion re-

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[24] *See e.g., McKart v. United States*, 395 U.S. 185, 195 (1969) ("A complaining party may be unsuccessful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene."); *see also Hodges v. Callaway*, 499 F.2d 417, 423 (5th Cir. 1974) ("Exhaustion is required in part because of the possibility that administrative review might obviate the need for judicial review.").

[25] *Oestereich v. Selective Service System*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result), quoted with approval in *Johnson v. Robison*, 415 U.S. 361, 368 (1974).

quirement.[26] As this Court stated in *Public Utilities Commission v. United States*, 355 U.S. 534 (1958):

> If . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued. But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.

Id., 355 U.S. at 539-40.

Coit's constitutional claims are also ripe for adjudication. In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), this Court established a two-fold test for ripeness, requiring the evaluation of (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. Both of these requirements are met in this case.

The fitness requirement is met because, as in *Gardner*, the issues tendered are "purely legal ones." 387 U.S. at 149. Accordingly, there is no need for further factual development by the administrative agency. Because this Court will be in no better position later than it is now to decide these questions, the issues are presently ripe for adjudication. *Duke Power Co. v. Carolina Envir. Study Group, Inc.*, 438 U.S. 59, 83 (1978).

Coit will also suffer considerable hardship if judicial review is postponed. On October 9, 1987, FSLIC sent Petitioner a notice of acceleration and foreclosure on real property under

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[26] *See Public Utils. Comm'n v. United States*, 355 U.S. 534, 539-40 (1958); *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1556 (11th Cir. 1985); *McGowan v. Marshall*, 604 F.2d 885, 892 (5th Cir. 1979).

mortgage to FirstSouth. (*See* P.A. 18-19; B.A. 16-26). While actual foreclosure proceedings have temporarily been held in abeyance, FSLIC can reinstitute foreclosure proceedings at any time during the administrative process, thereby causing Petitioner irreparable injury even if its constitutional claims and its underlying monetary claims against FirstSouth are ultimately vindicated in the courts.[27] Delaying resolution of Petitioner's constitutional challenge to *Hudspeth* places FSLIC in the unique position of being able to foreclose on Petitioner's properties even though Coit asserted defenses to the debts upon which the foreclosures were based and requested a declaratory judgment in the state court proceedings that the note and deed of trust were unenforceable. So long as Petitioner is confined to its administrative remedies, Petitioner is unable to protect itself in the courts against wrongful foreclosure. Furthermore, FSLIC's threatened foreclosure impairs Coit's ability to sell or improve the property by placing a cloud on Coit's title which can only be removed by an adjudication of Coit's claims that the note and deed of trust are unenforceable. This is a particular hardship in a volatile real estate market.

Secondly, if Coit is correct in its constitutional claims, the time spent in the administrative process will have been wasted and Coit will have to begin all over again in the courts. This substantial delay will cause significant and uncompensable damages to Coit. Under Texas law, Coit would be entitled to an award of prejudgment interest if it prevails on its damage claim against FirstSouth for breach of fiduciary

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[27] In this connection it should be noted that FSLIC cannot destroy ripeness by now promising not to exercise its right of foreclosure. *Cf., Abbott Laboratories*, 387 U.S. at 154, where this Court rejected a promise by the Solicitor General to forego use of criminal prosecution as an insufficient rebuttal to the argument that the hardship requirement had been met.

duty and implied duty of good faith and fair dealing.[28] Such an award has been held to be necessary to fully compensate a claimant for his injury. *Cavnar*, 696 S.W.2d at 553, n.2. However, because Coit is suing an insolvent debtor, the assets of which are by definition insufficient to satisfy the debts to all claimants in full, the time required by the administrative process will cause an uncompensable injury to Coit because it will not be able to recover prejudgment interest for the additional delay.[29]

This irreparable injury is distinct from the ordinary expense and annoyance of litigation. While Petitioner recognizes that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" for purposes of the hardship requirement,[30] an award of prejudgment interest from the date of injury to the date of judgment is part of the remedy under Texas law. Because the debtor in this case is insolvent and cannot pay prejudgment interest, the additional delay caused by requiring completion of the administrative process will further reduce the value of any

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[28] *See Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985); *Maxey v. Texas Commerce Bank of Lubbock*, 571 S.W.2d 39, 50-51 (Tex. Civ. App. — Amarillo), *writ ref'd n.r.e.*, 580 S.W.2d 340 (1978) (Bank assessed prejudgment interest on damages resulting from bad faith sale of collateral.).

[29] *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1 (1980) (In deciding whether to certify case for immediate appeal under Fed. R. Civ. P. 54(b), district court could properly consider prejudice to defendant that would result from delay in entering judgment in circumstances where legal rate of interest was below the existing market rate of interest.); *Cf., Duke Power Co.*, 438 U.S. at 71, n.15 (This Court permitted individuals to obtain a declaration regarding the constitutionality of governmental action "before potentially uncompensable damages are sustained.").

[30] *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974)).

recovery which Coit might ultimately obtain on its claims, quite apart from the costs of the litigation.

Finally, delay may impair Coit's ability to collect any judgment it might ultimately obtain because of the deteriorating financial condition of FirstSouth. *Cf. Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 12 (1980) ("If [General Electric's] financial position were such that a delay in entry of judgment on Curtiss-Wright's claims would impair Curtiss-Wright's ability to collect on the judgment, that would weigh in favor of certification"). Postponement of Petitioner's constitutional challenges therefore imposes a substantial hardship on Petitioner, which fully satisfies the ripeness requirement.[31]

II. Allowing FSLIC to Adjudicate All Claims Brought Against an Insolvent Savings and Loan Association Violates the Mandate of Separation of Powers in Article III of the U.S. Constitution.

Article III, Section 1, of the U.S. Constitution ("Article III") directs that the "judicial power of the United States shall be vested . . . in such inferior courts as the Congress may from time to time ordain and establish," and provides that the judges of such courts shall hold office during good behavior. The framers of the United States Constitution included this provision to ensure the independence of the federal judiciary from the control of the executive and legislative branches of government. Independence of the federal judiciary safeguards the checks and balances of the constitutional struc-

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[31] Ripeness could also be based in this case on the grounds that the agency proceeding suffers from a fundamental infirmity requiring judicial intervention to protect petitioner's rights to a fair proceeding. *Gulf Oil Corp. v. United States Dep't of Energy*, 663 F.2d 296, 312 (D.C. Cir. 1981); *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1156-57 (D.C. Cir. 1979), *cert. denied* 447 U.S. 921 (1980) (bias in rule-making proceedings).

ture and guarantees that the process of adjudication itself will remain impartial. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 59 (1982) ("*Marathon*").

This Court has carefully guarded the independence of the federal judiciary, permitting tribunals created by the legislature to exercise adjudicative power only in certain circumscribed areas in which the congressional assertion of power to create legislative tribunals is "consistent with . . . the constitutional mandate of separation of powers." *Marathon*, 458 U.S. at 64; *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S. Ct. 3245, 3261 (1986) ("*Schor*"). To the extent that FSLIC's enabling legislation is construed to give FSLIC adjudicatory powers over state law claims affecting the assets of an insolvent association, such legislation violates the constitutional mandate of separation of powers.[32]

A. Controlling Supreme Court Precedents

This Court held in *Marathon* that Article III was violated by a legislative scheme, very similar to the one at issue here, by which Congress empowered bankruptcy judges to adjudicate all claims that might affect the assets of a bankrupt estate. The bankruptcy courts, whose judges were appointed by the President of the United States for 14-year terms and whose

[32] The Dallas Court of Appeals so held in *Glen Ridge I Condominiums, Ltd. v. FSLIC*, 734 S.W.2d 374 (Tex. App. — Dallas 1986), *writ denied per curiam, FSLIC v. Glen Ridge I Condominiums, Ltd.*, 31 Tex. Sup. Ct. J. 294 (March 30, 1988) and the Ninth Circuit Court of Appeals has expressed grave concern that FSLIC's assertion of adjudicatory jurisdiction creates "series constitutional difficulties" under Article III. *Morrison-Knudsen*, 811 F. 2d at 1221.

On March 30, 1988, the Texas Supreme Court denied FSLIC's application for writ of error in *Glen Ridge I* in a per curiam opinion. 31 Tex. Sup. Ct. J. at 296. The court never reached the Article III issue because it found that FSLIC was not granted adjudicatory power under the applicable statutes and regulations. *Id.*

salaries were subject to adjustment by the legislature, were not Article III courts. This Court held that the legislative grant of judicial power to non-Article III tribunals did not fall within any of the circumscribed areas in which such delegation had been held to be consistent with Article III. Although Congress could constitutionally delegate to non-Article III courts the power to determine issues involving the "restructuring of debtor-creditor relations," which was held to be "at the core of the federal bankruptcy power," *Marathon*, 458 U.S. at 71, Congress could not constitutionally delegate to those courts the power to adjudicate any and all state-created private rights that might affect the assets of the estate in bankruptcy. The Court distinguished "private rights" under common law from "public rights," whose adjudication could be freely delegated by the Legislature because they arose in areas traditionally within the province of the legislative and executive branches of government. Examples of such "public rights" arising "between the Government and persons subject to its authority" included rights in such areas as interstate and foreign commerce, taxation, immigration, public lands, and public health. *Marathon*, 458 U.S. at 68-70 and n.22 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). Because the *Marathon* plaintiffs' claims for breach of warranty, breach of contract, duress, coercion, and misrepresentation were not "public rights," but rights *under common law arising between private parties* and historically determined by the courts, the bankruptcy court's broad assumption of jurisdiction over their adjudication violated the constitutional mandate of separation of powers.

In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), this Court upheld the delegation to non-Article III tribunals of power to adjudicate disputes between participants in a federal pesticide registration program. The Federal Insecticide, Fungicide, and Rodenticide Act

("FIFRA"), 7 U.S.C. §§ 136 *et seq.*, requires manufacturers of pesticides to register their pesticides with the Environmental Protection Agency ("EPA"). As a precondition to registration, manufacturers must submit research data to the EPA regarding the pesticides. Before 1972, the EPA without statutory authority considered data submitted by one registrant to support the registration of the same or a similar product by another registrant. Congress then expressly permitted the EPA to consider previously submitted data, and as an incentive to continued research and development by manufacturers, enacted a statutory scheme to compensate registrants under FIFRA whose data were used in registering other pesticides.

This Court held that the FIFRA scheme, which required that compensation disputes be submitted to binding arbitration with limited judicial review, did not violate Article III. The Court noted that as a matter of state law, property rights in trade secrets are extinguished when a company discloses its trade secret to persons who are not obligated to protect the confidentiality of the information. Therefore, any right of pesticide registrants to compensation resulted solely from rights created by Congress under FIFRA. Because the rights whose adjudication was delegated were not common law rights, but "public rights" created by Congress, Congress had broad authority to delegate their adjudication to tribunals of its creation.

In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), Congress granted the Commodity Futures Trading Commission ("CFTC") the power to adjudicate not only reparations actions against commodity brokers for violations of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 1 *et seq.*, but also counterclaims arising from the same transaction or occurrence as the reparations action. The Court held that the delegation of adjudicatory power over

those counterclaims did not violate Article III because the litigant in *Schor* had indisputably waived any right he might have had to full trial of his counterclaim in an Article III court. The Court went on to note, however, that permitting the agency to exercise jurisdiction over counterclaims arising out of the same transaction or occurrence as a broker's violation of the Act was much more consistent with the constitutional mandate of separation of powers than was the bankruptcy scheme that was held unconstitutional in *Marathon*. In *Marathon*, the bankruptcy courts were granted broad jurisdiction to determine all civil proceedings "related to" cases in which a petition had been filed under Title 11. Unlike *Marathon*, counterclaims in *Schor* were limited to particularized areas of law and fact, namely, those counterclaims arising from the same facts as violations of the Act. Additionally, the legislative scheme in *Schor* removed less power from the federal district courts than did the scheme in *Marathon*. The CFTC's permissive jurisdiction in *Schor* made no attempt to oust the federal court's original jurisdiction, and the CFTC's decisions were to be reviewed under the "weight of evidence" standard, rather than the more deferential standard used to review decisions of the bankruptcy courts in *Marathon*. The Court in *Schor* thus held that the *non-exclusive* grant to the CFTC of jurisdiction over a *narrow class* of common law claims as an *incident* to the CFTC's *unchallenged* adjudicative function did not substantially threaten the separation of powers. *Schor*, 106 S. Ct. at 3259-60.

B. Breadth of FSLIC's Asserted Jurisdiction

The jurisdiction that FSLIC asserts here over claims against insolvent savings associations in receivership goes far beyond the scope of delegation that this Court has permitted to coexist with the constitutional mandate of separation of powers. The delegation of power to FSLIC encroaches on the

powers usually vested in courts to a substantially greater degree than the legislation in *Schor* or *Thomas*. First, the breadth of adjudicatory power that FSLIC has embraced resembles very closely that granted to the bankruptcy courts and found to violate Article III in *Marathon*. FSLIC has asserted jurisdiction not over a narrow, particularized area peculiarly within its technical expertise as a federal executive agency, such as was found permissible in *Schor* and *Thomas*, but instead insists that it has the power to adjudicate any and all claims of any sort brought against an insolvent savings and loan association under its receivership, including common law claims and claims over which Congress has given federal courts exclusive jurisdiction.[33] FSLIC in this case alone asserts exclusive jurisdiction over causes of action based on usury, breach of fiduciary duty, and breach of an implied duty of good faith and fair dealing, claims which fall squarely within the realm of judicial power at common law. As in *Marathon*, such jurisdiction encompasses not only the permissible "public rights" issues involving the reorganization of insolvent savings and loan associations, but all manner of common law claims historically at the very core of judicial power. The breadth of claims over which FSLIC asserts jurisdiction is thus no narrower than the breadth of claims decided by most federal district courts.

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[33] FSLIC has asserted exclusive jurisdiction over a broad spectrum of claims ranging from antitrust to race discrimination. *See e.g., Baer v. Abel*, 637 F. Supp. 347 (W.D. Wash. 1986) (RICO, negligence, fraud, and misrepresentation); *FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987) (unjust enrichment and conversion); *FSLIC v. Provo Excelsior, Ltd.*, 664 F. Supp. 1405 (D. Utah 1987) (fraud, violation of state and federal securities law and state and federal racketeering laws); *Resna Associates, Ltd. v. Financial Equity Mortgage Corp.*, 673 F. Supp. 1371 (D.N.J. 1987) (race discrimination); *Red Fox Indus., Inc. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987) (antitrust). Theoretically, *Hudspeth* would apply even to an intersection collision case between a vehicle owned by a failed savings and loan institution and a hapless pedestrian.

C. Exclusivity of FSLIC's Asserted Jurisdiction

Further, in moving to dismiss Coit's action, FSLIC insists that its right to adjudicate claims against FirstSouth ousts the district court of such jurisdiction. Vital to this Court's holding in *Schor*, however, was the fact that the CFTC's jurisdiction was not exclusive, but concurrent with that of the courts.

> It is clear that Congress has not attempted to "withdraw from judicial cognizance" the determination of [the counterclaim]. Congress gave the CFTC the authority to adjudicate such matters, but *the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected*. In such circumstances, separation of powers concerns are diminished . . . Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.

Schor, 106 S. Ct. at 3260 (emphasis added). Unlike *Schor*, where the parties had the right to elect a forum, Coit without its consent has been totally deprived of its original choice of forum. The risk of encroachment on the judiciary is clearly at a maximum here where FSLIC asserts not concurrent but exclusive jurisdiction over claims that have traditionally been determined by courts.

D. Judicial Review of FSLIC's Decisions

Additionally, the federal courts here retain less power to review decisions of FSLIC than the courts retained over the CFTC's decisions in *Schor*. In *Schor*, the CFTC's orders were reviewed under the "weight of the evidence" standard, not the more deferential "clearly erroneous" standard employed in *Marathon*. In the absence of specific congressional direction, the determinations of FSLIC will be reviewed, if at all, under the "arbitrary and capricious" standard of the APA, or, at best, the APA's "substantial evidence standard," *see Morri-*

son-Knudsen, 811 F.2d at 1222, which accords FSLIC more deference even than the "clearly erroneous" standard accorded to decisions of district courts.[34]

E. Congressional Purpose

Furthermore, delegating power to FSLIC to adjudicate all claims that may affect insolvent savings and loan associations serves a less substantial public purpose than the delegations of power in *Thomas* and *Schor*. Because FSLIC has only recently in its 50-year history asserted that it has power to *adjudicate* claims of any sort, FSLIC has no particular expertise in adjudicating at all, much less in adjudicating claims under the common law. In *Thomas*, channeling to an agency tribunal all disputes among pesticide registrants as to compensation for use of data streamlined the resolution of disputes because the EPA arbitration panel had developed an expertise in that *narrow* area of law, i.e., compensation under FIFRA's guidelines. Similarly in *Schor*, the counterclaims which the CFTC was permitted to adjudicate were limited in their facts, in that they by very definition arose from the same facts involving violations of the Commodity Exchange Act, as to which the CFTC was expert.

Permitting agencies such as those in *Schor* and *Thomas* to adjudicate a narrow range of claims involving law and facts over which they have gained technical expertise encroaches on the judiciary only minimally. At the same time, because the agencies' expertise in these limited areas enables them to render speedy decisions based on a correct assessment of the law and facts, permitting such adjudication also serves legitimate public needs. Unlike the agencies in *Schor* and *Thomas*, however, FSLIC here, if permitted to adjudicate all claims

[34] *Millar v. FCC*, 707 F.2d 1530, 1540 (D.C. Cir. 1983); *see also Newsweek v. United States Postal Serv.*, 663 F.2d 1186, 1210 (2d Cir. 1981); *Refrigerated Transport Co. v. I.C.C.*, 663 F.2d 528, 531 (5th Cir. Unit B 1981).

brought against insolvent savings and loan associations under a FSLIC receivership, will not be dealing "only with a 'particularized area of law' " as to which it has developed technical expertise, but will exercise jurisdiction no less broad than that found unconstitutional in *Marathon*. *Schor*, 106 S. Ct. at 3258. The claims heard by FSLIC will not fall neatly within the areas involving the restructuring of savings and loan associations in which FSLIC has developed expertise, but will run the gamut of claims now heard by district courts. FSLIC is no better equipped to determine such claims than a court. FSLIC's supposed ability to reach an initial adjudication faster than a court likewise does not excuse violating Article III. This Court has long held that mere administrative convenience cannot justify violating the Constitution. *See, e.g., Tashjian v. Republican Party of Conn.*, ___ U.S. ___, 107 S. Ct. 544, 551 (1986).

F. Coit's Claims Are Not "Public Rights."

Last, there is no question here but that the rights on which Coit sues are not "public rights." Coit's allegations that FirstSouth committed usury and breached fiduciary duties and duties of good faith and fair dealing are not claims that arose in the context of any federal legislation. Coit is not suing on any federally created cause of action. Unlike the plaintiff in *Thomas*, Coit has taken no voluntary action, indeed no action whatsoever, to extinguish its common law rights. These rights vested independently of and prior to FSLIC's assumption of receivership power over FirstSouth. The mere fact that FSLIC became receiver of FirstSouth and substituted itself as defendant in this action in place of FirstSouth does not magically transform Coit's vested private rights into public rights. Because Coit's rights against FirstSouth have not been extinguished, and because Coit's causes of action were not created by federal statute, Coit's claims do not involve "public rights."

G. Conclusion

Because FSLIC's enabling legislation, as construed, encroaches impermissibly on the powers of the judiciary without meeting any substantial and legitimate public need, it violates Article III, § 1, of the U.S. Constitution.

III. Requiring Coit to submit its claims against FirstSouth to FSLIC for adjudication would deny Coit due process of law.

The due process clause of the Fifth Amendment of the U.S. Constitution entitles parties in administrative proceedings, as well as in civil and criminal cases, to an impartial and disinterested tribunal. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43, and n.2 (1980); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). Due process prohibits requiring a litigant to submit the adjudication of his rights to an official who "perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial." *Ward v. Monroeville*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 534 (1927).

The right to an impartial and disinterested tribunal may be violated even though the particular public official who acts as judge has no personal pecuniary interest in the outcome of the litigation. It is sufficient that the institution which the official represents has such a financial interest. *See Ward v. Monroeville*, 409 U.S. 57, 60 (1972) (mayor's responsibility for village financing made mayor partisan to maintain high level of contribution to village's coffers). Furthermore, this Court has recognized that the financial stake required to trigger a due process violation may be as indirect as an incentive to secure an advantage in other litigation, *see Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 1586-87 (1986), or an interest in reducing competition from a competitor. *See Gibson v. Berryhill*, 411 U.S. 564 (1973).

A. *FSLIC's pecuniary interest*

FSLIC is barred from adjudicating Coit's claims against FirstSouth, because it has an improper pecuniary interest in the outcome of those claims. As liquidating receiver for FirstSouth's assets, FSLIC must promptly reimburse FirstSouth's depositors from FSLIC's insurance fund. However, once it pays FirstSouth's depositors, it becomes the single largest claimant against FirstSouth's assets because it becomes subrogated to the claims of the reimbursed depositors.[35] As a competing claimant to the assets of FirstSouth, FSLIC has a direct, pecuniary interest in denying Coit's claims against the assets of FirstSouth. Clearly, the more creditor claims that FSLIC denies, the greater will be the funds available to satisfy FSLIC's own subrogation claims.[36]

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[35] *See Morrison-Knudsen*, 811 F.2d at 1215-16 (FSLIC "becomes both the holder of the claimed assets and, because subrogated to the reimbursed depositors' rights, the single largest claimant against such assets."); *see also Savings and Loan Receiverships: Hearings on S. 3436 Before the Senate Comm. on Banking and Currency*, 95th Cong., 2d Sess., 8, 10-11 (1968), where John E. Horne, then chairman of the FHLBB, testified:

> . . . . Usually 96 percent of the money in a savings and loan association, and frequently even in excess of that, is insured savings, and so, *when we pay out an insured association*, we pay in excess of 96 percent and *we* have *become by far the largest claimant and necessarily the party most concerned about how the matter is handled thereafter*. The claim of the FSLIC, as I have said, is overwhelmingly larger than that of any other claimant in a receivership.
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> . . . .
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> It is clear that *the Corporation, given its huge financial interest in every case, is the most highly motivated party* available to do the job in an orderly and economical way. (Emphasis added).

[36] *See United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd per curiam by equally divided court*, ___ U.S. ___, 107 S.Ct. 2171 (1987), where the court held that the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1381 *et seq.*, deprived withdrawing

B. *FSLIC's adversary interest*

Requiring Coit to submit its claims to FSLIC will also place Coit at the mercy of a tribunal that is its adversary with respect to those very same claims. FSLIC's statutorily mandated role is to exercise all powers, including the prosecution and defense of legal disputes, in the best interest of FirstSouth.[37] In its role as litigant, FSLIC notified Coit, on or about October 9, 1987, of acceleration and foreclosure on real property under mortgage to FirstSouth. (*See* P.A. 18-19; B.A. 16-26). While actual foreclosure proceedings are temporarily in abeyance, FSLIC can reinstitute them at any time during its review of Coit's claims. (B.A. 36). Thus, even while using *Hudspeth* as a shield, FSLIC is free to pursue debts allegedly owed by Coit to FirstSouth. It is not consistent with due process to require Coit to present its claims to a tribunal that has the power to foreclose on Coit's property and to seek damages from Coit for indebtedness which Coit contends is not owed.[38] Any proceeding in which a litigant is required to submit its claim to a tribunal which is a potential adverse

employers of due process because the "trustees have a natural inclination and may even consider it a duty to maximize the fund by extracting as much money as possible from withdrawing employers." 787 F.2d at 138. FSLIC has an even more pressing need to deny creditor claims because it is a competing claimant for the same assets.

[37] *See* 12 U.S.C. §§ 1464(d)(6)(C), 1729(b)(1)(A), 1729(c)(3)(B); *see also* 12 C.F.R. §§ 548.2(a), (b).

[38] The unfairness of requiring Coit to submit its claims to FSLIC is underscored by the fact that one of Coit's claims is for a declaratory judgment that the note and deed of trust forming the basis of FirstSouth's claim are void and unenforceable. (J.A. 23.) FSLIC would thus be in the position of determining the enforceability of the very agreements that it must rely on to recover against Coit. Due process clearly prohibits a tribunal from being a judge in its own case. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955).

litigant lacks even the "appearance of justice"[39] and cannot be reconciled with due process.

Furthermore, permitting FSLIC to adjudicate claims brought against an insolvent savings and loan association empowers it to enhance its adversarial position in other forums. The claims asserted offensively in this suit by Coit may also be raised by Coit as defenses to any suit by FSLIC on the indebtedness allegedly owed to FirstSouth. Under the statutory construction urged by FSLIC, FSLIC could as adjudicator in a FSLIC administrative proceeding determine Coit's claims adversely to Coit, and then attempt to collaterally estop Coit from raising its defenses in a subsequent suit in state or federal court on the notes.[40] This clearly violates the principle of *Lavoie*, which holds that a tribunal whose decisions can be used to enhance its own position as a party in a related lawsuit cannot possibly be deemed impartial.[41] 106 S. Ct. at 1587.

[39] *In re Murchison*, 349 U.S. 133, (1955) (*quoting Offutt v. United States*, 348 U.S. 11, 14 (1954)) ("to perform its high function in the best way 'justice must satisfy the appearance of justice' ").

[40] Furthermore, the regulations governing FSLIC contain no reference whatsoever to the procedural safeguards that ensure fairness of outcome. For example, the regulations make no provisions for a hearing on validity of claims, for an opportunity to present evidence, or for oral argument. This lack of procedural safeguards magnifies the unfairness of FSLIC's proposed scheme.

[41] It is submitted that the Fifth Circuit's reliance on *Woods v. FHLBB*, 826 F.2d 1400, (5th Cir. 1987), *cert. denied* 99 L. Ed.2d 422 (1988) in deciding this case was misplaced. *Coit*, 829 F.2d at 565. In *Woods*, the appellant claimed that an evidentiary hearing was required before or immediately after FSLIC seized the assets of an allegedly insolvent savings and loan because, under *Fuentes v. Shevin*, 407 U.S. 67 (1972), property should not be subject to seizure without a proper hearing. 826 F.2d at 1410. The claim was denied because the appellant was an entity regulated by FSLIC and therefore had impliedly consented to the summary procedures which FSLIC was authorized to employ. *Id.* at 1411-13.

IV. Requiring Coit to Submit its Claims Against First-South to FSLIC for Adjudication Would Deprive Coit of its Seventh Amendment Right to a Jury Trial.

The Fifth Circuit's position also violates Petitioner's right to a trial by jury as guaranteed by the Seventh Amendment to the U.S. Constitution. This Court has held that the Seventh Amendment applies to claims for damages (like Petitioner's herein) which are based upon statutes and the common law. *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

Although this Court has created limited exceptions to the right to jury trial, those exceptions do not apply here. One exception is for claims involving "public rights," defined as rights "arising between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," generally including such areas as taxation, commerce, and immigration. *Marathon*, 458 U.S. at 67-68, 70. The right to jury trial remains inviolate, however, as to "[w]holly private tort, contract, and property cases" such as Petitioner's claims. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 458 (1977).

Another exception is for actions "against the United States." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). In determining whether a lawsuit is against the United States, this Court has held that substance, not form, controls: "The

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Here the challenge is that FSLIC is not and cannot be impartial because it is a creditor of the failed savings and loan and therefore competing for the same assets as Coit. Obviously, Coit never impliedly consented to have its common law claims decided by a competing creditor or by a self-interested tribunal and is not a regulated entity subject to FSLIC's regulatory authority. Moreover, the due process argument in this case concerns the absence of an impartial tribunal. As such, it is governed by the standards set forth in *Ward* and *Tumey*, not by *Fuentes v. Shevin*. *Woods* is therefore no precedent whatever for the due process argument in this case.

identity of the named parties defendant is not controlling; the dispositive inquiry is, 'who will pay the judgment?' " *Stafford v. Briggs*, 444 U.S. 527, 542 and n. 10 (1980). The "most availing inquiry" in determining whether a suit has been brought against the United States is whether "the judgment sought would expend itself on the public treasury or domain .... Where recovery can be had from funds in the possession and control of the agency and not from the United States Treasury, the United States is not involved in the suit." *FSLIC v. Williams*, 599 F. Supp. 1184, 1203 (D. Md. 1984).

Any argument that Petitioner in this lawsuit has brought an action "against the government" ignores the substance and glorifies the mere form of the suit. Petitioner brought this suit not against FSLIC for any wrongful act committed by FSLIC in its capacity as insurer or receiver, but against FirstSouth. Petitioner here asserts legal rights based on a dispute between Petitioner and FirstSouth, a private entity, which rights vested *independently of and prior to* FSLIC's assumption of receivership power over FirstSouth. Petitioner faces FSLIC as a defendant solely because FSLIC substituted itself in the lawsuit in place of FirstSouth. Unlike suits "against the government," this suit will not result in any recovery from funds of the United States Treasury. Until such time as the receivership assets of FirstSouth are distributed, Petitioner will recover, if at all, from those receivership assets. Even after FirstSouth's assets are distributed, however, a judgment may be awarded against the insurance funds in FSLIC's possession and control without affecting funds in the public treasury. *FSLIC v. Williams*, 599 F. Supp. at 1203-04. Because Petitioner's suit is not against the government, Petitioner is entitled to a jury trial.

However, even if Coit's suit became a suit against the Government when FSLIC was appointed receiver for First-South, such appointment could not deprive Coit of its vested

right to trial by jury. It cannot be disputed that Coit would have been entitled to a jury trial on its claims against FirstSouth if FirstSouth had not been placed in receivership. Under the circumstances, Congress cannot indirectly deprive Coit of its right to jury trial by enacting a receivership statute any more than it could pass a statute that directly repealed Coit's right to jury trial. It is elementary that Congress cannot avoid the requirements of the Constitution by doing indirectly that which it may not do directly. *Anderson v. Martin*, 375 U.S. 399, 404 (1964). Congress may not therefore abridge Coit's vested right to a jury trial by replacing Coit's private defendant with FSLIC, and then granting FSLIC the exclusive power to adjudicate those claims.

CONCLUSION

For all of these reasons, Coit respectfully requests that the Fifth Circuit's judgment affirming the district court's dismissal of Coit's action be reversed and the action be remanded to district court for trial on the merits.

Respectfully submitted,

ROBERT E. GOODFRIEND
Counsel of Record
PAUL E. GALVIN
JEFFREY C. GLASS
THOMAS J. OWENS
AKIN GUMP STRAUSS
HAUER & FELD
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-4618
(214) 969-2800

ATTORNEYS FOR PETITIONER

May 5, 1988

APPENDIX

(For Office Use Only)

Claim No.: _____

Received: _____

Receipt Acknowledged:
By: /s/Elisha A. Bixby
Printed Name
Title: Asst Claims Coordinator
Date: 9/28/87

IN RE
FIRSTSOUTH, F.A.
PINE BLUFF, ARKANSAS
(The "Association")

PROOF OF CLAIM

I. **Claimant's Name: COIT INDEPENDENCE JOINT VENTURE AND MAX WILLIAMS, INDIVIDUALLY**, ("claimant"). Please fill out either subparagraph (a), (b), or (c). Fill out subparagraph (d) only if claimant is a partnership or a corporation, or if claimant is an individual who is claiming through an agent.

A. (INDIVIDUAL) The claimant has the following address **5950 Berkshire Lane, Suite 300, Dallas, TX 75225**, has the following Social Security number **458-58-1883**, and can be contacted by phone during normal business hours at **(214) 891-3300**.

B. (PARTNERSHIP) The claimant is a (general/limited) partnership organized under the laws of the State of **Texas**, has the following tax identification number **75-1905213**, and has the following mailing address **16800 Dallas Parkway, Suite 210, Dallas, TX 75248**.

C. (CORPORATION) The claimant is a corporation organized under the laws of the State of _____, has the following tax identification number _____, and has the following mailing address _____.

D. (Fill out in addition to (a), (b), or (c) above if the claim is by an agent.) The undersigned, whose mailing address is **Paul E. Galvin, Akin, Gump, Strauss, Hauer & Feld, 4100 First City Center, Dallas, TX 75201** is the **attorney of record** (describe nature of agency) of claimant, is authorized to make this proof of claim on behalf of the claimant, and can be contacted by phone during normal business hours at **(214) 969-2859**.

II. **Amount of Claim**. (State amount you are claiming) **$See attached, approximately $113 million**. This amount is claimed as a (check one) X General Unsecured Claim; ____ Secured Claim (See Paragraph 7); ____ Priority Claim (See Paragraph 8).

III. **Relief Other Than Monetary Claim**. (If claimant is seeking relief other than a monetary claim). The nature of the relief sought is as follows: **Declaratory judgment that FirstSouth, F.A., alternatively, is a general partner or co-venturer of Claimant as described in attached Plaintiff's Original Petition.**

IV. **Written Evidence of Claim or Basis for Relief**. (If claim or basis for relief is founded on writing). The writing on which this claim is founded or on which relief is being sought (or duplicate thereof) is attached hereto (or cannot be attached for the reason set forth in a statement attached hereto). **See attached petition and answer to number 5.**

V. **Judicial Proceedings**. (If legal proceedings have been filed or a judgment has been rendered on the claim or on the relief being sought.) A copy of the complaint or court order and other relevant materials are attached hereto showing the name of the case, the parties to the case, the court, the docket number, the date of judgment, if applicable, the name of the judge, and whether an appeal has been sought. **See attached.**

VI. **Credits.** The claimant certifies that the claim asserted herein does not include any amounts for which payment, part payment or other valuable consideration has been received.

VII. **Security Interest.** The following is a description of any security held for this claim **N/A**. The undersigned claims the security interest under the writing referred to in paragraph 4 hereof (or under a separate writing which is attached hereto or under a separate writing which cannot be attached hereto for the reason set forth in a statement attached hereto.) Evidence of perfection of such security interest, if any, is also attached hereto.

VIII. **Preference or Priority**. The undersigned hereby asserts the following preference or priority: **N/A**. (Please describe nature of priority claimed by reference to the List of Priorities attached hereto or available from the Receiver).

The undersigned hereby certifies that the information contained in this Proof of Claim Form, including the additional pages and statements attached hereto, is true and correct, and that all copies of documents submitted with this Proof of Claim Form are true and correct copies of the originals.

Date of Signature: 9/28/87 /s/ Paul Galvin
Signature

Name (please print): Paul E. Galvin

THE PENALTY FOR MAKING ANY STATEMENT KNOWN TO BE FALSE FOR THE PURPOSE OF INFLUENCING IN ANY WAY THE ACTION OF THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IS A FINE OF NOT MORE THAN $5,000.00 OR IMPRISONMENT FOR NOT MORE THAN TWO YEARS, OR BOTH (18 U.S.C. 1008).

THIS PROOF OF CLAIM MUST BE SUBMITTED TO AND RECEIVED BY THE RECEIVER ON OR BEFORE SEPTEMBER 28, 1987. FAILURE TO FILE A COMPLETED PROOF OF CLAIM BY SUCH BAR DATE WILL RESULT IN A DISALLOWANCE OF YOUR CLAIM. SUBMIT COMPLETED PROOF OF CLAIM FORMS TO:

The Federal Savings and Loan Insurance Corporation
As Receiver for FirstSouth, F.A.
1349 Empire Central, Suite 600
Dallas, Texas 75247
Attention: Claims Coordinator

SEE PREFERENCE OR PRIORITY (NO. 8)

SECURED CLAIMS

A. An allowed claim of a creditor secured by a lien on property of the Association or in which the Association has an interest is secured to the extent of the value of the property or the interest securing such claim, and is unsecured to the extent that such value is less than the amount of the allowed claim;

B. The secured claim of a secured creditor, if accepted as valid by the Receiver, shall be allowed, not to exceed the amount of the principal obligation, contractually determined interest to the date of payment, and any allowed prepayment penalty or fee;

C. A claim to security shall be recognized by the Receiver to the extent that, under the laws of the State of Arkansas, such creditor claim is secured by, or constitutes a lien on, assets or property of any kind of the Association or in which the Association has an interest;

D. Allowance of contractually determined interest may include, to the extent provided for by written contract, interest on ordinary contractual interest chargeable in the event of a failure to pay principal or interest when due;

E. The Receiver shall allow a claim for prepayment penalty or fee, if and only if, made pursuant to a written contract that provides for a prepayment penalty or fee, *provided*, however, that such prepayment penalty or fee allowed by the Receiver shall not exceed the present value of the loss attributable to the difference between the contract rate of the secured borrowing and the reinvestment rate available to the lender, and shall not be charged or used as a penalty for default; and

F. The Receiver may recover from property securing an allowed secured claim the reasonable necessary costs and expenses of preserving or disposing of such property to the extent of any benefit to the holder of such claim;

UNSECURED CLAIMS, PRIORITIES

G. Unsecured claims against the receivership estate of the Association that are proved to the satisfaction of the Receiver shall have priority in the following order:

a. Administrative expenses of the Receiver, including the costs, expenses, and debts of the Receiver;

b. Administrative expenses of the Association, provided that such expenses were incurred within thirty (30) days prior to the Receiver's taking possession, and that such expenses shall be limited to reasonable expenses incurred for services actually provided by accountants, attorneys, appraisers, or examiners, or incurred by employees which were authorized and reimbursable under a pre-existing expense reimbursement policy, that, in the opinion of the Receiver, are of benefit to the receivership, and shall not include wages or salaries of employees of the Association;

c. Administrative expenses of the Association for wages and salaries (including vacation, sick leave pay, and contributions to employee benefit plans) earned prior to appointment of the Receiver by an employee of the Association whom the Receiver determines it is in the best interests of the receivership to engage as an employee of the Association in receivership for a reasonable period of time;

d. Claims for wages and salaries (including vested vacation, sick leave pay, and contributions to employee

benefit plans) earned prior to the appointment of the Receiver, up to a maximum of three thousand dollars ($3,000) per person, by an employee of the Association whom the Receiver determines should not be engaged as an employee of the Association in receivership for a reasonable period of time;

e. Claims of governmental units for unpaid taxes, but no other claim of a governmental unit shall have a priority higher than that of the sixth category below;

f. Claims for withdrawable accounts, including those of the FSLIC as subrogee or transferee, and all other claims, whether liquidated or unliquidated, which have accrued and become unconditionally fixed on or before the date of default, except as provided in succeeding paragraphs of this section;

g. Claims other than those that have accrued and become unconditionally fixed on or before the date of default, including claims for interest after the date of default on claims of the sixth category, *provided* that any claim based on an agreement for accelerated, stipulated, or liquidated damages, which claim did not accrue prior to the date of default, shall be considered as not having accrued and become unconditionally fixed on or before the date of default;

h. Claims that have been subordinated in whole or in part to general creditor claims, which shall be given the priority specified in the written instruments that evidence such claims;

i. Claims by holders of nonwithdrawable accounts, including stock, which shall have priority within this ninth category in accordance with terms of the written instruments that evidence such claims; and

H. Interest after the date of default on claims of the sixth category in (g) above shall be at a rate or rates adjusted monthly to reflect the average rate for U. S. Treasury bills with maturities of not more than ninety-one (91) days during the preceding three (3) months; and

I. All unsecured claims of any category of priority described in (g)(1) through (g)(9) above shall be paid in full, or provision made for such payment, before any claims of lesser priority are paid; if there are insufficient funds to pay any claim or claims of one priority in full, distribution to claimants in such class shall be made pro rata; and notwithstanding anything to the contrary herein, the Receiver may at any time, and from time to time, prior to the payment in full of all claims of a class with higher priority, make distributions to claimants in priority classes (g)(1), g(2), (g)(3), (g)(4), (g)(5), and (g)(6) as the Receiver believes are reasonably necessary to conduct the receivership, *provided* that the Receiver determines that adequate funds exist or will be recovered during the receivership to pay in full all claims of any higher priority.

CLAIMANT COIT INDEPENDENCE JOINT VENTURE SUBMITS THIS PROOF OF CLAIM UNDER PROTEST AND WITHOUT WAIVING ITS RIGHTS TO HAVE THIS CASE TRIED BEFORE A JURY IN FEDERAL DISTRICT COURT IN THE EVENT THAT ITS APPEAL IS SUCCESSFUL. CLAIMANT COIT INDEPENDENCE JOINT VENTURE DOES NOT WAIVE ANY OF ITS RIGHTS BY THE SUBMISSION OF THIS PROOF OF CLAIM. CLAIMANT FURTHER DEMANDS THAT IT BE AFFORDED THE OPPORTUNITY TO CONDUCT DISCOVERY, SUBPOENA WITNESSES, PUT ON LIVE TESTIMONY, AND BE HEARD AT ANY HEARINGS WITH RESPECT TO THIS CLAIM.

2. Amount of Claim (state amount you are claiming) $37,296,332.00 with respect to the Rasor Tract Loan and $76,512,960 respecting the Frankford Property Loan described in Plaintiff's Original Petition attached hereto. The amount claimed on the Rasor Tract Loan is computed as follows: Loan amount $20,669,336.00 minus 310,000.00 (commitment fee) leaves a true principal amount of $20,359,336. The maximum amount of interest which could have been charged on this sum at eighteen percent (18%) interest for the 72 days between June 1, 1983 and August 12, 1983 is $722,895. The amount which Coit was actually charged equals $23,434,319 ($20,669,336 + 549,006 interest + 2,215,977 profit participation which in effect is interest). Accordingly the interest charged is $3,074,983 which is in excess of twice the amount of $722,895.00 which lawfully could have been charged. The usurious interest charged is $2,352,088.00 which when multiplied times three, the statutory damages under Article 5069-1.06 Tex. Rev. Civ. Stat. Ann., equals $7,056,264.00. That amount added to the forfeiture of the principal of $20,669,336.00, the statutory damages under Article 5069-1.06 Tex. Rev. Civ. Stat. Ann., equals $27,725,600.00 due as of August 12, 1983. Claimant is additionally entitled to a common law recovery of the usurious interest charged or received in the amount of $2,352,088. Prejudgment interest on the amount of $30,077,688 at six percent (6%) per year to August 12, 1987, equals $6,654,144.00, for a total damage claim on the Rasor Tract Loan as described in Plaintiff's Original Petition in the amount of $37,296,332.00. Alternatively, if the $310,000.00 commitment fee is not subtracted to arrive at a true principal loan amount, the interest charged still is in excess of twice the amount allowed by law and the damages claimed would be $35,704,138.00.

The amount of $76,512,960 claimed on the Frankford Property Loan secured by a deed of trust on the Frankford

Property as described in Plaintiff's Original Petition is computed as follows: Loan Amount of $30,000,000 minus $450,000 in fees leaves a true principal amount of $29,550,000. The maximum amount of interest which could have been charged or contracted for on this sum at eighteen percent (18%) interest for one year is $5,319,000. The amount which First-South contracted for or charged for one year equals $13,245,000 ($3,495,000 charged as interest plus $9,750,000 contracted for by FirstSouth in the form of a 25% profit participation. This sum is arrived at by multiplying 25% times the fair market value of the Frankford Property of $39,000,000 at the time of the making of the loan.) Accordingly, the interest contracted for or charged is $13,245,000 which is in excess of twice the amount of $5,319,000 which lawfully could have been charged or contracted for. The usurious interest contracted for and charged is $7,926,000 which when multiplied times three, the statutory damages under Article 5069-1.06, equals $23,778,000. That amount added to the forfeiture of the principal amount of the loan of $30,000.000, the damages under Article 5069-1.06 Tex. Rev. Civ. Stat. Ann., equals $53,778,000 due as of August 13, 1983. Claimant is additionally entitled to a common law recovery of the usurious interest charged or contracted for in the amount of $7,926,000.00. Prejudgment interest on the amount of $61,704,000 at six percent (6%) per year to August 12, 1987, equals $14,808,960, for a total damage claim on the Frankford Property Loan as described in Plaintiff's Original Petition in the amount of $76,512,960.

5. Attached hereto with respect to judicial proceedings filed on the claim are the following: Plaintiff's Original Petition, Defendant's Answer, Defendant's Petition for Removal, Order dismissing the case, Notice of Appeal filed by claimant, and the style of the case presently pending in the Fifth Circuit. Claimant has filed its brief in the Fifth Circuit and

has also filed a Petition for Initial Hearing en banc in the Fifth Circuit. As of this date, the Fifth Circuit has not acted on the Petition for Initial Hearing en banc nor has it decided the appeal of Claimant. Claimant additionally relies on documents in the custody or control of FSLIC or FirstSouth which have not been obtained by Claimant due to the absence of discovery in the judicial proceeding. The claim of Max Williams, individually, is based on his status as a guarantor of the Frankford Property Loan and extension thereof described in Plaintiff's Original Petition and evidenced by a Guaranty dated August 12, 1983, and by subsequent guaranties, copies of which are attached hereto.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

P.O. Box 64976
Chicago, IL 60664
Creditor Claims Department

Receiver For:
FirstSouth, F.A.

COIT INDEPENDENCE
JOINT VENTURE AND
MAX WILLIAMS
C/O AKIN, GUMP,
STRAUSS, et.al.
4100 FIRST CITY CENTER
1700 PACIFIC AV.
DALLAS, TX 75201-4618

Date of Notice: Mar 18 1988
Claim Number: 3-0620-1579

ATTN: PAUL E. GALVIN, ESQ.

NOTICE OF RETENTION OF CLAIM FOR FURTHER REVIEW

The Federal Savings and Loan Insurance Corporation, as Receiver for FirstSouth, F.A., Little Rock, Arkansas ("Receiver"), hereby notifies you that your Proof of Claim in the amount shown below and received by the Receiver on the date shown below has been retained for further review:

CLAIMANT: **COIT INDEPENDENCE JOINT VENTURE AND MAX WILLIAMS**

AMOUNT OF CLAIM: **APPROX. $113 MILLION**
DATE CLAIM RECEIVED: **09/28/87**

The Receiver will review your claim and notify you of its determination upon the completion of its review. During its review, the Receiver may request additional information or

materials relating to your claim. Please include your Claim No. referenced above on any future correspondence and direct any questions to the Receiver at the following address:

The Federal Savings and
Loan Insurance Corporation
as Receiver for
FirstSouth, F.A.
PO Box 64976
Chicago Illinois 60664
Attn: Claims Department

THE FEDERAL SAVINGS
AND LOAN INSURANCE
CORPORATION AS
RECEIVER FOR
FirstSouth, F.A.
Little Rock, Arkansas

BY: /s/ Hyacinth G. Meeks
Hyacinth G. Meeks
Regional Claims
Manager

CONTACT PERSON: Hyacinth G. Meeks
(312) 853-2210

CE''TIFICATE OF SERVICE BY MAIL

The undersi[illegible]d hereby certifies that a copy of the foregoing NOTICE OI[illegible]ETENTION was sent by certified and regular mail, postage pre-paid on *Mar 18 1988* to the following:

COIT INDEPENDENCE
JOINT VENTURE
AND MAX WILLIAMS
C/O AKIN, GUMP,
STRAUSS, et.al.
4100 FIRST CITY CENTER
1700 PACIFIC AV.
DALLAS, TX 75201-4618

ATTN: PAUL E. GALVIN, ESQ.

/s/ Hyacinth G. Meeks
Hyacinth G. Meeks
Regional Claims Manager

ANDREWS & KURTH
Coit/Independence Project
Attorneys
4400 Thanksgiving Tower
Dallas, Texas 75201
(214) 979-4400
Telex 70-9669
Telecopier (214) 969-9334

Texas Commerce Tower
Suite 700
Washington, D.C. 20004
(202) 662-2700

1730 Pennsylvania
Avenue, N.W.
Suite 700
Washington, D.C. 20004
(202) 662-2700

October 9, 1987

Certified Mail No.
P-498 070 244
Return Receipt Requested

Coit Independence Joint Venture
16800 Dallas Parkway,
Suite 210
Dallas, Texas 75248

Attention: David L. Gray

Certified Mail No.
P-498 070 246
Return Receipt Requested

Mr. A. Starke Taylor, Jr.
Coit Independence Joint Venture
Dallas, Texas 75248

Certified Mail No.
P-498 070 247
Return Receip' Requested

Mr. Charles C. Taylor
Coit Independence Joint
Venture
16800 Dallas Parkway,
Suite 210
Dallas, Texas 75248

Certified Mail No.
P-498 070 247
Return Receipt Requested

Mr. David L. Gray
Coit Independence Joint
Venture
16800 Dallas Parkway,
Suite 210
Dallas, Texas 75248

Re: Notice of Acceleration and Foreclosure

Dear Sir:

Please be advised that because of the unpaid indebtedness referenced in the attached Notice of Sale by Substitute Trustee by which Joseph M. Osborne, Substitute Trustee acting at the direction and request of the Federal Savings And Loan Insurance Corporation, as Receiver for FirstSouth, F.A. (the "Receiver") gives notice of sale at foreclosure of the property therein described, and because of the currently existing default in regard thereto, all of said indebtedness has been and hereby is accelerated. In addition, foreclosure of all property described therein will be made in accordance with the terms of said notice unless payment in full of the described indebtedness is made prior to the foreclosure date. Please note that said foreclosure will occur on the first Tuesday of the next month, same being November 3, 1987 between the hours of 10:00 a.m. and 4:00 p.m. at the steps of the Collin County Courthouse in McKinney, Texas.

Enclosed are the Federal Home Loan Bank Board's Procedures for the Administration and Determination of Requests for Expedited Relief from Decisions or Threatened Actions of the FSLIC as Receiver. Any questions regarding the Bank Boards procedures should be directed to the Federal Home

Loan Bank Board, Adjudication Division, 1700 G. Street, N.W. Washington, D.C. 20552; (202)377-7399.

Very truly yours,

/s/ JOSEPH M. OSBORNE
Joseph M. Osborne

Enclosures

cc: Donna R. Harrigan
Special Representative for FSLIC
as Receiver for FirstSouth, F.A.
1600 FirstSouth Building
Little Rock, AR 72201

James P. Cooke, Esq.
Hopkins & Sutter
545 East John Carpenter Freeway
Irving, TX 75062

Steven D. Chantelois,
Federal Asset Disposition Association
5080 Spectrum Drive
Suite 1100 E
Dallas, TX 75248

Home Federal Savings and Loan
100 South Main
Mountain Home, AR 72653

Attention: Eddie King

Coit/Independence Project

NOTICE OF SALE BY SUBSTITUTE TRUSTEE

THE STATE OF TEXAS
COUNTY OF COLLIN
} KNOW ALL PERSONS BY THESE PRESENTS:

THAT, WHEREAS, Graylor Investments, Inc. ("Original Borrower"), became indebted to FirstSouth Federal Savings and Loan Association ("Lender"), as evidenced by (i) that certain Promissory Note, dated August 12, 1983, in the original principal sum of Thirty Million and No/100 Dollars ($30,000,000.00), executed and delivered by Original Borrower to the order of Lender, as payee, bearing interest and being due and payable as therein provided, said Note and all liens securing same have been assigned to Coit Independence Joint Venture ("Borrower") by assignment dated August 12, 1983, said assignment having been recorded in Volume 1715, Page 41 in the Official Public Records of Real Property of Collin County, Texas; (ii) that certain promissory note dated November 30, 1984, in the original principal sum of Three Million and No/100 Dollars ($3,000,000.00), executed and delivered by Borrower to the order of Lender, as payee, bearing interest and being due and payable as therein provided; and (iii) that certain promissory note dated November 7, 1985 in the original principal sum of Four Million Six Hundred Thousand and No/100 Dollars ($4,600,000.00), executed and delivered by Borrower to the order of Lender, as payee, bearing interest and being due and payable as therein provided (collectively, the "Notes"); and

WHEREAS, the indebtedness evidenced by the Notes (the "Indebtedness") is secured by, among other items, (i) that certain Deed of Trust (the "First Deed of Trust") dated August 12, 1983, executed by Original Borrower, to E. Harley

Cox, Jr., Trustee for the benefit of Lender, said First Deed of Trust being filed for record and recorded in the Official Public Records of Real Property of Collin County, Texas in Volume 1715, Page 24, (ii) that certain Deed of Trust (the "Second Deed of Trust") dated November 30, 1984, executed by Borrower, to E. Harley Cox, Jr., Trustee for the benefit of Lender, said Second Deed of Trust being filed for record and recorded in the Official Public Records of Real Property of Collin County, Texas in Volume 2033, Page 464, (iii) that certain Deed of Trust (the "Third Deed of Trust") dated November 7, 1985, executed by Borrower, to E. Harley Cox, Jr., Trustee for the benefit of Lender, said Third Deed of Trust being filed for record and recorded in the Official Public Records of Real Property of Collin County, Texas in Volume 2252, Page 749; (iv) that certain Extension Agreement dated August 12, 1984 between Borrower and Lender recorded in Volume 2009, Page 214 of the Official Public Records of Real Property of Collin County, Texas; (v) that certain Extension Agreement dated November 1, 1984 between Borrower and lender recorded in Volume 2033, Page 462 of the Official Public Records of Real Property of Collin County, Texas; (vi) that certain Extension Agreement dated August 19, 1985 between Borrower and Lender recorded in Volume 2199, Page 70 of the Official Public Records of Real Property of Collin County, Texas; (vii) that certain Extension Agreement dated August 19, 1985 between Borrower and lender recorded in Volume 2199, Page 72 of the Official Public Records of Real Property of Collin County, Texas; (collectively, the "Collateral Documents") covering property described in Exhibit "A" and "B" hereto, along with all appurtenances, improvements, fixtures and personal property of any kind located thereon or pertaining thereto, leases and rents relating hereto as more fully described therein (all of which is hereinafter referred to as the "Premises"); and

WHEREAS, the Notes and the Collateral Documents and all other documents securing the Note are now held by the Federal Savings and Loan Insurance Corporation, acting in its limited capacity as Receiver for FirstSouth, F.A. ("Beneficiary"); and

WHEREAS, to the full extent the Collateral Documents or any other security agreement held by Beneficiary covers both real and personal property, any of said personal property which is part of the Premises or which is otherwise covered by a lien or security interest in favor of Beneficiary will be hereinafter included in the definition of Premises as used herein and sold at public sale, hereinafter described, pursuant to Section 9.501(d) of the Texas Uniform Commercial Code; and

WHEREAS, there may be certain leases, rental agreements, easements and/or other matters (collectively, the "Other matters") covering and/or affecting the Premises currently in existence; and

WHEREAS, the liens securing the payment of the Indebtedness may be senior and superior to one or more of the Other Matters and junior and inferior to other of the Other Matters; and

WHEREAS, with respect to the liens securing the payment of the Indebtedness, which are senior to the Other Matters, if any, Beneficiary may subordinate its liens securing the Indebtedness to any one or more of the Other Matters and may not so subordinate such liens to other of the Other Matters; and

WHEREAS, in the event Beneficiary chooses to subordinate its liens securing the Indebtedness to any Other Matters, such decision will be announced at the foreclosure sale; and

WHEREAS, default has been made in the payment of the Notes and the Indebtedness, and the Notes are now unpaid, delinquent and in default; and

WHEREAS, Beneficiary has given all required notices to Borrower with regard to the defaulted Indebtedness; and

WHEREAS, pursuant to the authority granted in the First Deed of Trust, the Second Deed of Trust and the Third Deed of Trust (collectively, the "Deeds of Trust"), Beneficiary has appointed the undersigned as Substitute Trustee under the Deeds of Trust pursuant to a duly authorized and executed appointment document; and

WHEREAS, Beneficiary has requested the undersigned to enforce the liens of the Deeds of Trust by sale of the Premises in the manner set forth under the terms of the Deeds of Trust and pursuant to the laws of the State of Texas; and

WHEREAS, the undersigned, Substitute Trustee, acting upon the request of said Beneficiary, by these presents is hereby posting, filing and giving notice of the foreclosure of the Deeds of Trust and the lien thereof in accordance with applicable Texas law and the terms and provisions of the Deed of Trust; and

NOW, THEREFORE, I, the undersigned, Joseph M. Osborne, Substitute Trustee as aforesaid, do hereby give notice that after due publication of this notice as required by law and the Deeds of Trust, I will sell the Premises at public vendue to the highest bidder or bidders, for cash, between the hours of 10:00 a.m. and 4:00 p.m. on the first Tuesday in November next, the same being November 3, 1987 at the courthouse door in McKinney, Collin County, Texas, where foreclosure sales are customarily held in such county.

EXECUTED this *9th* day of October, 1987.

/s/ JOSEPH M. OSBORNE
Joseph M. Osborne,
Substitute Trustee

THE STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared *Joseph M. Osborne*, Substitute Trustee, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that (s)he executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this *9th* day of October, 1987.

/s/ NANCY RICCA RILEY
Notary Public in and for TEXAS

(SEAL)

Printed Name of Notary:

My Commission Expires:
7/5/89

EXHIBIT "A"

Being a tract or parcel of land situated in the City of Dallas, Collin County, Texas, and being part of the John Clay Survey, Abstract No. 223, and else being part of 313.78 acre tract of land conveyed to Texas Research Foundation by deed recorded in Volume 464, Page 376, of the Deed Record of Collin County, Texas; and being more particularly described as follows:

BEGINNING at a point for corner at the intersection of the Northwesterly line of the St. Louis and Southwestern Bell Railroad right of way (100 feet wide) and the Westerly line of FM 3193 (130 feet wide);

THENCE, South 75 degrees 09 minutes 35 seconds West along the Northwesterly line of said railroad right of way a distance of 164.29 feet to a point for corner in the Westerly line of said Clay Survey;

THENCE, North 0 degrees 46 minutes East along the Westerly line of said Clay survey and the Westerly line of said Texas Research Foundation tract a distance of 1894.02 feet to a point for corner in the centerline of Renner Road;

THENCE, South 88 degrees 48 minutes East along the centerline of Renner Road and the Northerly line of said Clay Survey a distance of 147.97 feet to a point for corner in the Westerly line of FM 3193;

THENCE, South 0 degrees 26 minutes 55 seconds West along the Westerly line of FM 3193 a distance of 1848.73 feet to the place of beginning and containing 6.5798 acres (286,614 square feet) of land.

EXHIBIT "B"

BEING a tract of land in the City of Renner and being out of the Collin County School Land Survey, abstract No. 169, Collin County, Texas, and also being part of the land conveyed by Claude R. McClennahan, Jr., Trustee, to Wm. K. Campbell, Jr., Coit Road Limited Partnership by deed recorded July 27, 1970, in Volume 762, Page 153 of the Collin County Deed Records and being more particularly described as follows:

BEGINNING at a found iron rod on the South right-of-way line of Frankford Road (Renner Road) (60 feet wide), said point being 30.0 feet South 01 degrees 01 minutes 00 seconds West from the Northeast corner of the 97.5 acre tract conveyed by Abe M. Cain and wife, to J.W. Williams, et. al., by deed dated November 10, 1934, in Volume 297, Page 59 Collin County Deed Records;

THENCE South 01 degrees 01 minutes 00 seconds West, departing said South line and along the dividing line between the East line of said Williams tract and the West line of the tract conveyed to Texas Research Foundation by deed in Volume 464, Page 376 Collin County Deed Records, a distance of 1863.9 feet to a found fence post for a corner on the Northwesterly line of the right-of-way of the St. Louis & Southwestern Railway, (100 feet wide);

THENCE South 75 degrees 30 minutes 00 seconds West, along said Railway right-of-way line, being 50.0 feet perpendicularly distant Northwesterly of and parallel with the center line of the track thereon, a distance of 915.0 feet to a found iron rod for a corner, said iron rod being the most easterly corner of the 5.0-acre tract conveyed by Tom Campbell to Ples Reader, Inc., by deed dated November 14, 1969, in Volume 745, Page 634 Collin county Deed Records;

THENCE North 14 degrees 30 minutes 00 seconds West, departing and perpendicular to said right-of-way, along the easterly line of said Reader tract, a distance of 231.95 feet to a found iron rod for a corner;

THENCE South 75 degrees 30 minutes 00 seconds West, parallel with said right-of-way, along the Northerly line of said Reeder tract, a distance of 1031.2 feet to a bois d'arc post for a corner on the east line of the lot described as:

> "Lot on North side of St. Louis & Southwestern Railway in the West line of the Nick Pierce School Land.
> Beginning at a stake, on point where line crosses right of
> Thence East, with right of way, 50 feet;
> Thence North to center of branch;
> Thence with branch West to the center of dividing line;
> Thence South to right of way, the place of beginning";

in deed from J. F. Dickerson to F. W. Jackson, filed February 27, 1908, in Volume 149, Pages 562-563, Collin County Deed Records;

THENCE North 00 degrees 47 minutes 00 seconds West, parallel with Dickerson Street, a distance of 52.64 feet to a point for a corner in said branch, said point being the Northeast corner of said Jackson tract;

THENCE South 89 degrees 13 minutes 00 seconds West, along the center of said branch and the North line of said Jackson tract, a distance of 48.57 feet to a point for a corner on the East line of Dickerson Street;

THENCE North 00 degrees 47 minutes 00 seconds West, along the East line of Dickerson Street, being 30.0 feet East of and parallel with its center line, a distance of 165.0 feet to an angle point in said line, said angle point being a set iron rod;

THENCE North 01 degrees 37 minutes 00 seconds East, along the East line of Dickerson Street, being 30.0 feet East of and parallel with its center line, a distance of 1834.37 feet to a set iron rod being the beginning of a curve at the intersection of Dickerson Street with Frankford Road;

THENCE along said curve to the right, having a central angle of 89 degrees 06 minutes 00 seconds and a radius of 102.06 feet, an are distance of 158.71 feet, said are having a chord which bears North 46 degrees 10 minutes 00 seconds East, 143.20 feet, to the end of said curve on the South line of Frankford Road, said end of curve being a set iron rod;

THENCE South 89 degrees 17 minutes 00 seconds East, along the South line of Frankford Road, being 30.0 feet South of and parallel with its center line, a distance of 1872.05 feet to the POINT OF BEGINNING AND CONTAINING 3,969,627 square feet or 91.130 acres of land more or less.

RE: COIT INDEPENDENCE JOINT VENTURE } REQUEST FOR EXPEDITED RELIEF
Claim No. 3-0620-1579

Coit Independence Joint Venture, Claimant under Claim No. 3-0620-1579, hereby submits this its Request for Expedited Relief by reason of the threatened action of a Notice of Foreclosure, a copy of which is attached hereto as Exhibit "A," and requests that the Federal Home Loan Bank Board ("Bank Board") intercede on Claimant's behalf to instruct the Receiver to refrain from proceeding with the foreclosure sale scheduled for November 3, 1987. Claimant makes this request under protest and without waiving any of its rights to proceed in a court of competent jurisdiction to restrain the Receiver from proceeding with the foreclosure in the event of an adverse determination by the Bank Board.

Claimant's Request for Expedited Relief is based on the following:

I.

Coit Independence Joint Venture ("Coit" or "Claimant") filed a lawsuit against FirstSouth, F.A. alleging claims of usury and seeking a declaratory judgment that FirstSouth and Claimant were in fact partners with respect to the land transaction described in the Plaintiff's Original Petition. As shown by the Proof of Claim, a copy of which is attached hereto as Exhibit "B," Coit claims damages in excess of $113 million against FirstSouth by reason of the usurious loans entered into by FirstSouth. The lawsuit against FirstSouth was dismissed by the court pursuant to *Hudspeth* after FSLIC took over FirstSouth. Coit's case has been appealed to the Fifth Circuit Court of Appeals and a Petition for Initial Hearing en banc has been filed by Coit. Although filed by Coit in July of 1987, the Fifth Circuit has still not acted on Coit's for Initial Hearing en banc nor has the Fifth Circuit

ruled on Coit's appeal. Further, beginning in August, 1986, Coit's representatives attempted to negotiate with FirstSouth a workout of the loans which are presently posted for foreclosure. Coit received no response from FirstSouth. After FSLIC took over FirstSouth, Coit's representatives have attempted to work through and with the Federal Asset Disposition Association ("FADA") through its representative, Mr. Paul Harris, to negotiate a workout of the subject loans. Coit has made an offer to Mr. Harris which Mr. Harris has indicated to Coit may be accepted by FSLIC and the Bank Board as a method to renegotiate and work out the subject loans. Those conversations with Mr. Harris took place as recently as September and early October, 1987. Mr. Harris has not indicated to Coit's representatives when FSLIC will consider the offer or when it will make a counteroffer, but he has indicated to representatives of Coit that the normal procedure would take at least two months and possibly as many as four months. However, despite the ongoing negotiations FSLIC has posted the subject loans for foreclosure on November 3, 1987. It is highly improbable, given the bureaucratic nature and work load of FSLIC and FADA, that FSLIC, the Bank Board, or FADA will be able to consider, accept, or counteroffer the offer made by Coit before November 3, 1987. Accordingly, by reason of the fact that the amount of Coit's claims against FirstSouth are far in excess of the claims made by FirstSouth against Coit, by reason of the ongoing negotiations between Coit and Mr. Paul Harris of FADA, and by reason of the pendency of the appeal and by reason of the fact that FirstSouth's assets and FSLIC's assets may not be adequate to support a judgment by Coit against FirstSouth and FSLIC, Coit respectfully requests the Bank Board to instruct the Receiver not to foreclose on the subject property on November 3, 1987.

II.

The relevant case law on which Coit relies for this Request is the case of *Guardian Savings & Loan Association v. Williams*, 731 S.W.2d 107 (Tex. App. — Houston [1st Dist.] 1987) and the cases cited therein. A copy of the *Williams* case is attached hereto as Exhibit "C" and incorporated herein by reference.

III.

The relevant documentation in support of Coit's request is in part attached to the Proof of Claim. Due to the ambiguous phrasing of the Bank Board procedures which require all "relevant documentation" to be submitted, Coit has not submitted every document that it would introduce in trial hereof but will be willing to supply further documentation at the request of the Bank Board. Coit also submits the Affidavit of Charles C. Taylor, Exhibit "D," and reincorporates the usury calculations made in the Proof of Claim attached hereto.

IV.

Coit's assessment of the likelihood of success on the merits of the underlying claim is that Coit has an excellent chance of prevailing on the underlying claim. For example, the claim based on the Rasor Tract loan as described in Plaintiff's petition was a no risk situation for FirstSouth. After FirstSouth became aware that Coit had a contract to sell the property at a substantial profit within a short period of time FirstSouth insisted on the 25% profit participation interest. There were no services rendered by FirstSouth in connection with the loan and there can be no other conclusion but that the profit participation contracted for, charged, and received

by FirstSouth was compensation for the loaning of funds to Coit, which is defined as interest under Texas law. Under the usury calculations set forth in the Proof of Claim, on the Rasor Tract loan itself, Coit would be entitled to damages against FirstSouth in excess of $35 million.

V.

The probable imminent and irreparable harm likely to be suffered by Coit in the event the expedited relief is not granted will be that a foreclosure sale of the property will deprive Coit of its equity in the property, will deprive it of its ability to develop and utilize the unique property, will deprive Coit of its right to sell or mortgage the property at some time in the future, and will deprive Coit of the full benefit of the value of the property. Further, as shown by the Affidavit of Charles C. Taylor, attached hereto, the foreclosure sale would adversely affect credit ratings of the partners of Coit, would ruin the reputation of the Coit partners as developers, and may prevent the Coit partners from further borrowing money at other financial institutions in the United States. Due to the unique nature of real estate in general and this property in particular (*see Greater Bank v. Conte*, 641 S.W.2d 407, Tex. App. — Houston [14th Dist.] 1982, no writ), the damages suffered by Coit would not be monetarily compensable.

VI.

I hereby certify that Donna R. Harrigan, Special Representative, Federal Savings and Loan Insurance Corporation as Receiver for FirstSouth Federal Savings & Loan Association, 111 Center Street, Little Rock, Arkansas 72201-2413, has received a copy of Coit's Request for Expedited Relief.

Respectfully submitted,

/s/ PAUL GALVIN
Paul E. Galvin

Of AKIN, GUMP, STRAUSS,
HAUER & FELD
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75301-4618
Telephone: (214) 969-2800

Attorney for Claimant
Coit Independence Joint
Venture

BEFORE THE DIRECTOR
OFFICE OF FEDERAL SAVINGS & LOAN
INSURANCE CORPORATION
FEDERAL HOME LOAN BANK BOARD

COIT INDEPENDENCE JOINT VENTURE,
Petitioner
v.
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRSTSOUTH, F.A.
Respondent

DOCKET NO. 87-157
REQUEST FOR EXPEDITED RELIEF

OCTOBER 27, 1987

RESPONDENT'S MOTION TO DISMISS

The Federal Savings and Loan Insurance Corporation ("FSLIC"), as Receiver for FirstSouth, F.A. ("Respondent"), by and through its attorneys, Hopkins & Sutter, moves to dismiss the Request for Expedited Relief ("Request") filed on behalf of Coit Independence Joint Venture ("Petitioner") seeking expedited relief from threatened action of the Respondent set forth in a notice of acceleration and foreclosure from counsel to Respondent dated October 9, 1987, and in support of its Motion states:

1. On December 4, 1986, the Federal Home Loan Bank Board ("Bank Board") appointed the FSLIC as sole receiver of FirstSouth, F.A., at which time the Respondent succeeded to all rights formerly held by FirstSouth, F.A. under the loan which is the subject of the Request.

2. Petitioner filed its Request with the Bank Board and served a copy of the same on Respondent on October 21, 1987.

3. Petitioner's Request seeks intervention by the Bank Board on Petitioner's behalf to "instruct [Respondent] to refrain from proceeding with the foreclosure sale scheduled for November 3, 1987." Petitioner seeks no other relief in its Request.

4. Respondent, for reasons unrelated to the grounds for relief raised in the Request, has notified Petitioner by letter dated October 26, 1987 that Respondent will not proceed with the foreclosure sale scheduled for November 3, 1987. A copy of the letter so notifying Petitioner is attached hereto as Exhibit "A". Thus, the threatened action of Respondent, which is the subject of the Request, is no longer threatened and will not occur, if at all, without further notification to Petitioner of a subsequent foreclosure sale (the next permissible date of which is December 8, 1987).

5. Due to the withdrawal of Respondent's notice of foreclosure sale, the Respondent's right to foreclose its lien is now merely an inchoate right to seek foreclosure at a later date and the Request is, therefore, premature. See *Harold and Betty Rice, et. al.*, FHLBB Docket No. 87-062 (July 8, 1987) (slip op. at 2).

WHEREFORE, Respondent respectfully moves that its Motion to Dismiss Petitioner's Request be granted because the threatened foreclosure by Respondent, which is the subject of the Request, has been withdrawn and the Request, therefore, is premature.

Respectfully submitted,

By: /s/ James P. Cooke
James P. Cooke
Michael B. Solow
HOPKINS & SUTTER
545 E. Carpenter Freeway
Suite 1000
Dallas, Texas 75062
(214) 830-6020

Attorneys for the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, as Receiver for FirstSouth, F.A.

CERTIFICATE OF SERVICE

I, James P. Cooke, hereby certify that a copy of the foregoing document was placed in the United States mail in Dallas, Texas, first class postage prepaid and addressed to Petitioner, c/o Petitioner's attorney, on this 27th day of October, 1987.

/s/ JAMES P. COOKE
James P. Cooke

ANDREWS & KURTH
Attorneys
4400 Thanksgiving Tower
Dallas, Texas 75201
(214) 979-4400
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Telecopier (214) 969-9334

Texas Commerce Tower
Suite 700
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1730 Pennsylvania Avenue, N.W.
Suite 700
Washington, D.C. 20004
(202) 662-2700

October 26, 1987

Coit Independence Joint Venture
16800 Dallas Parkway, Suite 210
Dallas, Texas 75248

Mr. A. Starke Taylor, Jr.
Coit Independence Joint Venture
16800 Dallas Parkway, Suite 210
Dallas, Texas 75248

Attention: David L. Gray

Mr. Charles C. Taylor
Coit Independence Joint Venture
16800 Dallas Parkway, Suite 210
Dallas, Texas 75248

Mr. David L. Gray
Coit Independence Joint Venture
16800 Dallas Parkway, Suite 210
Dallas, Texas 75248

Re: (a) Promissory Note dated August 12, 1983, in the principal sum of $30,000,000, executed by Coit Independence Joint Venture, payable to FirstSouth F.A. (as extended; (b) Promissory Note dated September 23,

1983, in the principal amount of $3,000,000, executed by Coit Independence Joint Venture and payable to the order of FirstSouth, F.A. (as extended); and (c) Promissory Note dated November 7, 1985, in the principal amount of $4,600,000, executed by Coit Independence Joint Venture, payable to the order of FirstSouth, F.A. (as extended).

Gentlemen:

This letter will evidence my instructions from the Federal Savings and Loan Insurance Corporation acting in its limited capacity as Receiver for FirstSouth, F.A. (the "FSLIC") not to foreclose the liens securing the above referenced loans on Tuesday, November 3, 1987, provided however, that the FSLIC reserves the right to repost the property for foreclosure.

Nothing contained herein shall be deemed to be a waiver of any event of default or other provision of any promissory notes or loan documents evidencing the above referenced loans, nor shall this letter be construed to be a reinstatement of the indebtedness under such loans.

Very truly yours,

/s/ JOSEPH M. OSBORNE
Joseph M. Osborne
Substitute Trustee

cc: Donna R. Harrigan
Special Representative for FSLIC
as Receiver for FirstSouth, F.A.
1600 First South Building
Little Rock, Arkansas 72201

Steven D. Chantelois
FADA
5080 Spectrum Drive
Suite 1100E
Dallas, Texas 72653

Home Federal Savings and Loan
100 South Main
Mountain Home, Arkansas 72653

Attention: Eddie King

Hand Delivered
James P. Cooke, Esq.
Hopkins & Sutter
545 East John Carpenter Frwy
Irving, Texas 75062

FEDERAL HOME LOAN BANK BOARD
WASHINGTON, D.C.

COIT INDEPENDENCE JOINT VENTURE,
Petitioner

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRSTSOUTH, F.A.
Respondent

Docket No. 87-157
Request for Expedited Relief

October 30, 1987

ORDER OF DISMISSAL

On October 21, 1987, Coit Independence Joint Venture [Petitioner] filed a Request for Expedited Relief from a notice of foreclosure dated October 9, 1987, and served on petitioner by the Federal Savings and Loan Insurance Corporation as Receiver for FirstSouth, F.A. (Little Rock, Arkansas) [Respondent]. The foreclosure was scheduled for November 3, 1987.

On October 28, 1987, the Federal Home Loan Bank Board received a letter from the Respondent, dated October 27, 1987, stating that the Respondent "for reasons unrelated to the grounds for relief raised in the Request, has notified Petitioner by letter dated October 26, 1987 that Respondent will not proceed with the foreclosure sale scheduled for November 3, 1987." (Letter at 3.)

Accordingly, the Request for Expedited Relief filed by Coit Independence Joint Venture on October 21, 1987, is hereby DISMISSED WITHOUT PREJUDICE.

By the Federal Home Loan Bank Board,

/s/ JUDITH L. FRIEDMAN
Judith L. Friedman
Associate General Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *ORDER OF DISMISSAL* in FHLBB Docket No. 87-157 was sent by DHL Worldwide Express on October 30, 1987, to the following:

Paul E. Galvin, Esquire
Akin, Gump, Strauss, Hauer & Feld
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75301-4618

Bruce R. Coulombe, Esquire
Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002

Donna Harrigan
Special Representative
Federal Savings and Loan Insurance Corporation as Receiver for FirstSouth, F.A.
111 Center Street
Little Rock, Arkansas 72601

/s/ JUNE O. STEWART
June O. Stewart
Paralegal
Adjudication Division

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

12 U.S.C. § 1464(d)(6)(C) of the Home Owners Loan Act of 1933 provides:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the [Federal Home Loan Bank] Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

12 U.S.C. § 1728(c) of the National Housing Act provides:

> No action against the [Federal Savings and Loan Insurance] Corporation to enforce a claim for payment of insurance upon an insured account of an insured institution in default shall be brought after the expiration of three years from the date of default unless, within such three-year period, the conservator, receiver, or other legal custodian of the insured institution shall have recognized such insured account as a valid claim against the insured institution and the claim for payment of insurance shall have been presented to the Corporation and its validity denied, in which event the action may be brought within two years from the date of such denial.

12 U.S.C. § 1729(c) and (d) of the National Housing Act provide:

> Powers of Corporation and Federal Home Loan Bank Board on Default of other institutions
>
> (c)(1) In the event any insured institution other than a Federal savings and loan association is in default, the Corporation shall have authority to act as conservator, receiver, or other legal custodian of such insured institution, and the services of the Corporation are tendered to the court or other public authority having the power of appointment. If the Corporation is so appointed, it shall

> have the same powers and duties with respect to the insured institution in default as are conferred upon it under subsection (b) of this section with respect to Federal savings and loan associations. If the Corporation is not so appointed it shall pay the insurance as provided in section 1728 of this title, and shall have power (1) to bid for the assets of the insured institution in default, (2) to negotiate for the merger of the insured institution or the transfer of its assets, or (3) to make any other disposition of the matter as it may deem in the best interests of all concerned.
>
> (2) In the event of the Federal Home Loan Bank Board determines —
>
> (A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal savings and loan association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;
>
> (B) that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole receiver for such institution. As used in this paragraph (2), the term "State" includes the Commonwealth of Puerto Rico, the territories and possessions, and any place subject to the jurisdiction of the United States.

(3) In any case where the Corporation is appointed receiver of an insured institution pursuant to paragraph (2) —

(A) the provisions of section 1464(d) of this title shall be applicable in the same manner and to the same extent as if such institution were a Federal savings and loan association with respect to the Corporation had been appointed receiver under paragraph (6) thereof, and the provisions of paragraph (14) of said subsection (d) shall be applicable in the same manner and the same extent that they would be applicable if the insured institution were an institution referred to in the first sentence of said paragraph; and

(B) the Corporation shall have authority to liquidate such institution in an orderly manner or to make such other disposition of the matter as it deems to be in the best interests of the institution, its savers, and the Corporation.

In connection with the liquidation of any such institution, the language "the court or other public authority having jurisdiction over the matter" in subsection (d) this section shall mean the Board.

Additional Powers of Corporation

(d) In connection with the liquidation of insured institutions in default, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

12 U.S.C. § 1730(k)(1) of the National Housing Act provides:

Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court of the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any

court of any State or of the United States or any territory, or any other court.

Section 549.4 of the Federal Home Loan Bank Board Regulations provides, in relevant part:

(b) The receiver shall allow any claim seasonably received and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor. Mailing notice of the disallowance to the claimant's last address appearing on the association's books or on the proof of claim shall be sufficient notice. Unless, within 30 days after notice is mailed, the claimant files a written request for payment regardless of the disallowance, disallowance shall be final, except as the Board may otherwise determine.

Section 569a.8 of the Federal Home Loan Bank Board Regulations provides, in relevant part:

(b) any claim filed on or before the date fixed pursuant to paragraph (a) of the section and proved to the satisfaction of the Receiver shall be allowed by the Receiver. The Receiver may disallow in whole or in part any creditor claim or claims of security, or priority not proved to its satisfaction, and notice of such disallowance or rejection together with the reason therefor shall be served by the Receiver upon the claimant by certified mail. The mailing of notice of such disallowance or rejection to the last known address of any claimant appearing on the books or the proof of claim shall be deemed sufficient for the purposes hereof.

(8)

No. 87-996

SUPREME COURT, U.S.
FILED
JUN 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF FIRSTSOUTH, F.A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

CHARLES FRIED
Solicitor General
LOUIS R. COHEN
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

52pp

QUESTIONS PRESENTED

1. Whether claims against an insolvent federally-insured savings and loan association that has been placed in receivership must be presented in the first instance to the receiver in accordance with the Federal Home Loan Bank Board's regulations.

2. Whether requiring creditors of insolvent federally-insured savings and loan associations to exhaust their remedies under the Bank Board's regulations before seeking judicial enforcement of their claims violates Article III of the Constitution, the Due Process Clause of the Fifth Amendment, or the Seventh Amendment right to trial by jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-996

COIT INDEPENDENCE JOINT VENTURE, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF FIRSTSOUTH, F.A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 829 F.2d 563. The order of the district court (Pet. App. A5-A6) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A8) was entered on October 16, 1987. The petition for a writ of certiorari was filed on December 14, 1987, and was granted on March 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. IV) 1461 *et seq.*, the National

Housing Act, 12 U.S.C. (& Supp. IV) 1701 *et seq.*, and regulations promulgated by the Federal Home Loan Bank Board (12 C.F.R. 549.4) are reproduced as an appendix to this brief.

STATEMENT

This case arises from the decision of the Federal Home Loan Bank Board (Bank Board) to appoint the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for FirstSouth, F.A., a federally chartered and federally insured savings and loan association havings its principal place of business in the State of Arkansas. Petitioner Coit Independence Joint Venture (Coit) seeks review of the court of appeals' decision dismissing its suit against the receiver on the ground that FSLIC has "exclusive jurisdiction" (Pet. App. A2, A3) over claims against a failed savings and loan association for which the Bank Board has appointed FSLIC the receiver. Before turning to the facts of this case, we describe the applicable statutory and regulatory framework.

A. *The Statutory And Regulatory Scheme*

Savings and loan associations (S&Ls) are financial institutions that lend money and provide interest-bearing savings accounts. In the past, S&Ls tended to be smaller than commercial and savings banks, and they historically have had substantially more limited functions. For most of their history they have been the principal source of home-mortgage loans. See F. Ornstein, *Savings Banking: An Industry in Change* (1985); T. Marvell, *The Federal Home Loan Bank Board* 4 (1969).

Prior to 1932, the regulation of S&Ls was left entirely to the states. S&Ls, their borrowers, and their depositors

were severely affected by the Great Depression,[1] however, and the federal government took important steps to ease that crisis and forestall future ones. First, Congress enacted the Federal Home Loan Bank Act, ch. 522, 47 Stat. 725, whose main purpose was to create a source of funds that could be loaned to S&Ls to increase their liquidity. T. Marvell, *supra,* at 20. The Act created the Federal Home Loan Bank Board to oversee the process. Congress next passed the Home Owners' Loan Act of 1933 (HOLA), ch. 64, 48 Stat. 128. Among other things, HOLA provided for the creation of federal S&Ls to be chartered and regulated by the Bank Board. Congress completed the "S&L trilogy" with the National Housing Act (NHA), ch. 847, 48 Stat. 1246. The NHA established a program of federal insurance for the deposit accounts of both federally and state-chartered S&Ls and created FSLIC to administer the program. The NHA also provided for the appointment of FSLIC as receiver of federal (and in some cases state) S&Ls that are in need of receivership.

HOLA today accords the Bank Board broad and detailed authority to charter, regulate, and liquidate federal S&Ls (12 U.S.C. (& Supp. IV) 1464). "Pursuant to this authorization, the Board has promulgated regulations governing 'the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.' " *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta,* 458 U.S. 141, 145 (1982) (quoting *People* v. *Coast Federal Savings & Loan Ass'n,* 98 F. Supp. 311, 316 (S.D. Cal. 1951)).

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[1] During the Depression years at least 20% of American homeowners were unable to keep current on their mortgage payments. Despite a foreclosure rate of 240,000 per year, declining property values and massive depositor withdrawals resulted in the failure of some 1,700 S&Ls during the 1930's, with losses to depositors of $200 million. T. Marvell, *supra,* at 18-19.

The NHA requires FSLIC to insure the accounts of all federally-chartered S&Ls (12 U.S.C. 1726(a)(1)) which in turn are obligated to pay premiums into the insurance fund, as well as to undergo periodic examinations (12 U.S.C. 1726(b)). The statute also permits FSLIC to insure the accounts of state-chartered S&Ls pursuant to the same conditions (12 U.S.C. 1726(a)(2) and (b)). If an insured S&L defaults,[2] FSLIC is required to pay that S&L's depositors (either by a cash payment from its insurance fund or by a transferred account in a new institution) "as soon as possible" (12 U.S.C. 1728(c)). Avoiding defaults and the concomitant need to make payouts is of course an important concern of FSLIC and the Bank Board. See T. Marvell, *supra,* at 97.

Recognizing the importance of minimizing defaults, Congress gave FSLIC the power to render a variety of types of financial assistance to ailing S&Ls (12 U.S.C. 1729(f)). Congress also put at the Bank Board's disposal various mechanisms for deterring and terminating activities of a federal S&L or its officials that the Bank Board deems to present a risk to the S&L's financial well-being (12 U.S.C. 1464(d)(1)-(5)).

A federal S&L is not eligible to become a bankrupt (11 U.S.C. (& Supp. IV) 109). Its only statutory path to a "corporate grave" is Section 5(d)(11) of HOLA, which gives the Bank Board power "to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations * * * and for the conduct of conservatorships and receiverships" (12 U.S.C. 1464(d)(11)). In particular, the Board has power to ap-

[2] "The term 'default' means an adjudication or other official determination of a court of competent jurisdiction or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured institution for the purpose of liquidation" (12 U.S.C. 1724(d)).

point a receiver for a federally chartered S&L, ex parte and without prior court approval, when one or more of the following grounds exists (12 U.S.C. (Supp. IV) 1464(d)(6)(A)):

> * * * (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound conditions [*sic*] to transact business; (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board.

Both HOLA and the NHA make clear that only FSLIC may be the receiver for a federal S&L (12 U.S.C. 1464(d)(6)(D), 1729(b)). The NHA also permits FSLIC to serve as receiver for a federally-insured state S&L if selected by the proper state authority (12 U.S.C. 1729(c)(1)(A)) and gives the Bank Board power to apoint FSLIC receiver of a state S&L in certain circumstances (12 U.S.C. 1729(c)(1)(B) and (2)).

When FSLIC is appointed receiver and proceeds to liquidate an S&L in default, it must carry out that process "in an orderly manner" (12 U.S.C. 1729(b)(1)(A)(v) and (c)(3)(B)), and "pay all valid credit obligations [of the defaulting S&L]" on a pro rata basis in accordance with the Bank Board's resolutions delineating the receiver's powers and duties (12 U.S.C. 1729(b)(1)(B), (c)(1)(A) and (c)(1)(B)(i)(II)). To accomplish these goals, Congress delegated exceedingly broad powers to FSLIC as liquidating

receiver (12 U.S.C. 1729(d)):

> In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

Congress has further provided (12 U.S.C. 1464(d)(6)(C)):

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

When FSLIC acts as a liquidating receiver, it proceeds much like a bankruptcy trustee, marshalling the assets of the S&L and paying "all valid credit obligations" to the extent of available assets and according to the priorities of the obligations. FSLIC exercises these functions in accordance with the receivership regulations designated in the Bank Board resolution appointing the receiver.[3] Among

[3] Congress gave the Bank Board power to issue regulations for the liquidation of insolvent federally-chartered S&Ls in 1933. See Home Owners' Loan Act of 1933, ch. 64, § 5(d), 48 Stat. 133 (codified as amended at 12 U.S.C. 1464(d)(11)). In 1941, the Bank Board promulgated regulations governing FSLIC receiverships of federal S&Ls (6 Fed. Reg. 4413). Those regulations are presently set forth, as amended, at 12 C.F.R. Pt. 549. In 1968, the Bank Board adopted similar

other things, the regulations require FSLIC, at the direction of the Bank Board, to publish a notice to the defaulting S&L's creditors to present their claims to FSLIC by a date specified in the notice (12 C.F.R. 549.4(a), 549.5-1(b)(1), 569a.8(a)).[4] They further direct FSLIC to allow all seasonably filed claims proved to its satisfaction (12 C.F.R. 549.4(b), 549.5-1(b)(2)). If FSLIC disallows a claim it must notify the claimant of the disallowance and the reason therefor (*ibid.*). The regulations provide for Bank Board review of FSLIC disallowances of claims (12 C.F.R. 549.4(b) and (d), 549.5-1(b)(2) and (4)). Claims that are allowed by FSLIC or the Bank Board are paid to the extent that funds are available (*ibid.*).

In response to the growing size, complexity, and number of liquidating receiverships it oversees, the Bank Board has undertaken to revise its regulations to set forth its administrative claims process with greater specificity. On April 21, 1988 it published a set of interim procedures that are to remain in effect until a final regulation is promulgated. The interim procedures have been employed since July 1, 1986 (see 53 Fed. Reg. 13105 (1988)), and thus they have governed the FirstSouth claims process from the outset.

The interim procedures require FSLIC as receiver to send "to all potential claimants of the association [in receivership] as shown on the books and records of the association, or as otherwise may be known to the Receiver * * *, (1) a notice of their right to present claims to the

regulations governing FSLIC receiverships of state S&Ls under 12 U.S.C. 1729(c)(2). See 12 C.F.R. Pt. 569a.

[4] We use the term "creditors" in this context as encompassing all persons with claims against the receivership estate, whether based on contract or tort. See 12 C.F.R. 569a.1-569a.8 (treating all claims against the estate of a state-chartered institution in FSLIC receivership as "creditor" claims).

Receiver, (2) a Proof of Claim form, and (3) a copy of the 'Procedures and Instructions for Filing Claims with the FSLIC as Receiver' " (53 Fed. Reg. at 13107).[5] The last document is a short summary of the interim procedures. Among other things, it informs the claimant that to make a claim he must submit a Proof of Claim form along with "all necessary supporting documentation available to [that] claimant * * *." *Instructions for Filing Claims with the FSLIC as Receiver* 1 (Feb. 12, 1987) [hereinafter *Instructions*].

The initial phases of the claims process are handled by a "Special Representative" appointed by the Director of the Office of the Federal Savings and Loan Insurance Corporation specifically for this purpose (53 Fed. Reg. at 13107). Claims that have not been filed in accordance with the directions contained in the notice and/or Proof of Claim form are returned with an explanation of the deficiencies, and the claimant is given the opportunity to correct them (53 Fed. Reg. at 13107-13108). Properly filed claims are assigned to an agent of the Special Representative for an initial determination whether to allow or disallow each claim (53 Fed. Reg. at 13108). A claim may be allowed in whole based upon the S&L's books and records (*ibid.*). The Special Representative must notify each claimant in writing as to whether the claim is allowed in whole or retained for further review (*ibid.*; *Instructions* 1).

Agents of the Special Representative review each claim that is retained for further review (53 Fed. Reg. at 13108). They are empowered to require additional documentation or written information, access to non-privileged documents in the claimant's custody or control, and sworn

[5] A copy of the *Instructions for Filing Claims with the FSLIC as Receiver* has been lodged with the Clerk of the Court.

written responses to written questions (*ibid.*; *Instructions* 1).[6] Upon evaluating the administrative record, the Special Representative makes a proposed determination of allowance or disallowance (53 Fed. Reg. at 13109). Claimants who are dissatisfied with the proposed determination may submit a request for reconsideration, stating the specific grounds for such request (*ibid.*; *Instructions* 2).[7] After considering the record as supplemented by any request for reconsideration, or, after the time for requesting reconsideration has expired without submission of a request, the Special Representative, on behalf of FSLIC, issues a final determination of allowance or disallowance of the claim (53 Fed. Reg. at 13110; *Instructions* 2). If the claim is disallowed in whole or in part, the Special Representative notifies the claimant and informs him of his right to Bank Board review of the determination (53 Fed. Reg. at 13110; *Instructions* 2).[8] Claimants are given 60 days to file a

[6] The procedures provide for discovery of non-privileged documents in the possession of the receiver (53 Fed. Reg. at 13108). They also provide for inspection of the record by the claimant (*id.* at 13109; *Instructions* 2). The claimant has the right to request that the record be supplemented (*Instructions* 2). The Special Representative has discretion to grant a claimant's request to appear before an agent of the Special Representative to give statements, discuss the claim, or negotiate a settlement of the claim, and indeed may require such appearance (53 Fed. Reg. at 13109). In addition, the Special Representative may request that claimants submit memoranda addressing legal issues bearing on the claim (*ibid.*).

[7] The Special Representative is required to reply promptly in writing to requests for reconsideration, stating whether he agrees or disagrees with the contentions in the request, and setting forth any proposed modifications to the proposed determination (53 Fed. Reg. at 13110; *Instructions* 2). The request for reconsideration and the Special Representative's reply become part of the record (53 Fed. Reg. at 13110).

[8] To facilitate exercise of the right to Bank Board review, the Special Representative is required to send all claimants whose claims

written request for Bank Board review (53 Fed. Reg. at 13111). In addition to the notice, a claimant lodging such a request must provide a statement of the facts and arguments upon which the request is based and a statement of alleged factual and legal errors supported by relevant citations (*ibid.*). The receiver (FSLIC) is entitled to respond to the arguments in the claimant's request within 10 days of receiving it (*ibid.*).

The Bank Board conducts an initial review of the request to determine whether more information is needed (53 Fed. Reg. at 13111).[9] Within 180 days from the date the record is closed, the Board issues a decision on the merits of the appeal (*ibid.*). Alternatively, within 30 days from the date the record is closed, the Board may entertain oral argument, or other supplementary proceedings, in which case a decision will issue within 180 days of the completion of these supplementary proceedings (*ibid.*). If the Board has neither issued an opinion during the 180-day time period nor granted an extension, FSLIC's initial determination stands (*id.* at 13112).

Separate from the claims process are the Bank Board's procedures for obtaining expedited relief. These procedures permit persons to seek Bank Board relief from a decision or threatened action of FSLIC as receiver (53

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are not allowed in full a copy of the Bank Board's *Procedures for the Processing and Determination on Review of Determinations of the FSLIC as Receiver* (53 Fed. Reg. at 13110; *Instructions* 2). These procedures also are published in the Federal Register. See 53 Fed. Reg. at 13110-13112.

[9] If more information is necessary, the Board so notifies the claimant (53 Fed. Reg. at 13111). The record consists of the receiver's record, the request for review, and the receiver's response, if any (*ibid.*). Claimants are entitled to supplement the record upon a showing of good cause (*ibid.*). Upon finding that the record provides a sufficient basis for decision, the Board deems the record closed (*ibid.*).

Fed. Reg. at 13112). For example, if FSLIC issues a notice of foreclosure, the property owner may file a request for expedited relief, asking that the Bank Board instruct FSLIC not to foreclose until there has been a determination on the merits (*ibid.*). To prevail, the petitioner for expedited relief must make the traditional showing necessary for a preliminary injunction (*ibid.*). The Bank Board may issue stays to preserve the status quo pending its decision on the request for expedited relief (*id.* at 13113). The Bank Board's decision on a request for expedited relief is subject to immediate judicial review (*ibid.*).

B. *Proceedings Below*

1. Coit initiated this action against FirstSouth in October 1986 in the 95th Judicial District Court of Dallas County, Texas. In its petition (Pet. App. A9-A16), Coit alleged that in 1983 FirstSouth made it two loans of $20 million and $30 million to purchase two separate tracts of undeveloped land. Under the terms of the loans, Coit was required to give FirstSouth a 25% "profit participation" interest in any profits derived from the eventual sale of the properties. Coit contended that FirstSouth's "profit participation" was in reality interest that, when coupled with the regular accrued interest, made the loans usurious. Coit further alleged that FirstSouth charged "extension fees" for each annual extension of the $30 million loan and required Coit to execute $7.6 million in additional promissory notes. According to Coit, these fees and notes also constituted interest, rendering the $30 million loan usurious. Finally, Coit claimed that FirstSouth orally agreed to allow Coit to draw down funds to improve the property purchased with the $30 million loan, to loan Coit additional funds to carry the interest on the notes, and to renew the notes until the property was sold. Coit charged

that FirstSouth violated this oral agreement in August 1986 by refusing to renew the notes and threatening to foreclose on the property.

Coit sought damages from FirstSouth for charging usurious interest on the loans. Alternatively, Coit requested a declaratory judgment that FirstSouth was in reality Coit's partner by virtue of FirstSouth's profit participation interest and that, as a partner, FirstSouth had breached its fiduciary duty and implied duty of good faith and fair dealing. Coit claimed that FirstSouth's conduct relieved Coit of its obligations under the outstanding notes.

On December 4, 1986, two months after Coit filed this lawsuit, the Bank Board determined that FirstSouth was insolvent "in that the assets of the association [were] less than its obligations to its creditors and others" (12 U.S.C. (Supp. IV) 1464(d)(6)(A)(i)). See pages 4-5, *supra*. At that time, FirstSouth had gross liabilities of $1.7 billion. Based on its determination of insolvency, the Bank Board exercised its authority under 12 U.S.C. (Supp. IV) 1464(d)(6)(A) and (B)(i) to appoint FSLIC as receiver for FirstSouth. FSLIC then substituted itself for FirstSouth as the defendant in Coit's state court litigation and removed the action to the United States District Court for the Northern District of Texas. See 12 U.S.C. 1730(k)(1)(C).

2. Upon removal, FSLIC moved to dismiss Coit's action. In its motion to dismiss, FSLIC argued that, like FirstSouth's other creditors, Coit must submit its claims for initial determination under the administrative claims process. See 12 C.F.R. 549.4. The district court, relying on *North Mississippi Savings & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 474 U.S. 1054

(1986), entered judgment for FSLIC.[10] The court stated (Pet. App. A5 (emphasis in original)):

> FSLIC has the exclusive power to determine *all* claims—including those raised in litigation—against the FSLIC, as receiver for a savings and loan association.

On Coit's appeal, the Fifth Circuit upheld the district court's judgment of dismissal (Pet. App. A1-A4). The court of appeals adhered to its previous decisions requiring creditors to present their claims against failed S&Ls to FSLIC for resolution.[11] The court below also concluded that Coit's constitutional challenges to the Bank Board's statutory and regulatory scheme were not ripe for resolution, noting that "FSLIC may allow all or [some] of Coit's claims, depriving Coit of standing and a grievance" (Pet. App. A4).

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[10] In *Hudspeth*, the Fifth Circuit held that creditors of a failed S&L must present their claims to the Bank Board's administrative claims process before "going forward in any court" (756 F.2d at 1103). The Fifth Circuit reasoned that the statutory and regulatory scheme ousts the courts from making the initial determination of the validity of creditors' claims, observing (756 F.2d at 1102):

> [R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: the FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as receiver, such a delay is a "restraint" within the scope of the statute.

The Fifth Circuit has reaffirmed *Hudspeth* in *Red Fox Industries* v. *FSLIC*, 832 F.2d 340 (1987); *Thomes* v. *Equitable Savings & Loan Ass'n*, 831 F.2d 558 (1987); *FSLIC* v. *Bonfanti*, 826 F.2d 1391 (1987), petition for cert. pending *sub nom. Zohdi* v. *FSLIC*, No. 87-255 (filed Aug. 5, 1987); and *Chupik Corp.* v. *FSLIC*, 790 F.2d 1269 (1986).

[11] The Fifth Circuit denied Coit's request for an initial hearing en banc to reconsider *Hudspeth* (Pet. App. A2 n.1).

3. Coit filed its claim with FSLIC, for approximately $113 million, on September 28, 1987, the deadline established in the notice published by the receiver of FirstSouth. See Pet. Br. A1-A2. As of April 20, 1988, 1,773 creditor claims had been filed against the FirstSouth receivership. Approximately 400 of these claims were filed by shareholders who, in light of FirstSouth's insolvency, cannot reasonably expect to receive any proceeds of the final distribution. Of the remaining non-shareholder claims, 129 have been allowed fully, 21 have been allowed in part and disallowed in part, and 285 have been disallowed. Approximately 500 other claims have been referred to the receiver's counsel for legal advice. Thus far, only five requests have been filed seeking Bank Board review of the Special Representative's determination.

SUMMARY OF ARGUMENT

Congress has entrusted the Bank Board with virtually complete responsibility, to the exclusion of the bankruptcy laws, for liquidating insolvent federal savings and loan associations. The Bank Board, in turn, has established an administrative claims process that permits FSLIC, as receiver, to examine all claims against the S&L in a centralized forum and to determine whether to allow, settle, or disallow each claim. This approach permits the Bank Board and FSLIC to liquidate insolvent S&Ls in an orderly manner, to decide in light of all relevant circumstances whether to settle or disallow each disputed claim, and to make prompt pro rata payments on claims FSLIC allows or settles. The Bank Board quite reasonably believes that this centralized process is the most sensible and efficient method for resolving competing (and often interrelated) claims to a common, limited pool of assets.

Coit objects to the rules the Bank Board has laid down, contending that FSLIC does not and cannot constitutionally have power to "adjudicate" claims. We submit that the proper question, instead, is whether the Bank Board may require each creditor to present its claim to FSLIC and exhaust the administrative claims procedures before pursuing judicial resolution of the claim. We further submit that the Bank Board certainly has that power.

A. The Bank Board has ample authority under its empowering statute, HOLA, to establish an administrative claims process. Section 5(d)(6) of HOLA, as amended, specifically authorizes the Bank Board to reorganize or liquidate an insolvent federal S&L, using FSLIC as receiver for that purpose (12 U.S.C. (& Supp. IV) 1464(d)(6)). Section 5(d)(11) then broadly provides that the Board shall have power to make rules and regulations for the liquidation of associations and the conduct of receiverships (12 U.S.C. 1464(d)(11). That grant of power, read in light of FSLIC's receivership responsibilities under the NHA—including its duties, under the direction of the Bank Board, to liquidate an institution in an orderly manner (12 U.S.C. 1729(b)(1)(A)(v)) and to pay valid credit obligations (12 U.S.C. 1729(b)(1)(B)), and its power to settle or compromise claims (12 U.S.C. 1729(d))—authorizes the Bank Board to create an administrative mechanism for evaluating creditor claims. FSLIC cannot liquidate a failed institution in an orderly manner unless it has an efficient procedure for identifying all creditors, sorting out their relationships, and determining the nature, size, and validity of their claims.

The Bank Board's power to establish an administrative claims process necessarily includes the power to insist that creditors participate in and complete the administrative procedures before pursuing a judicial resolution. The basic objective of the claims process—namely, to cen-

tralize and, to the extent possible, resolve without litigation all claims against a limited pool of assets—would be nullified if claimants could pursue court action without completing the claims process. HOLA itself requires that courts respect the Bank Board's administrative processes: Section 5(d)(6)(C) provides that the courts shall not "restrain or affect the exercise of powers or functions" of the receiver (12 U.S.C. 1464(d)(6)(C)).

There is, of course, nothing novel in requiring potential litigants to pursue and exhaust their administrative remedies before seeking judicial relief. All of the familiar principles of administrative law that ordinarily justify exhaustion—such as the need for uniform, consistent and efficient resolution of disputes—take on special significance when creditors press claims against a common, finite pool of assets that must bear the costs of litigating the validity of any particular claim. The Bank Board's administrative claims process permits an expert agency to develop the facts and attempt to resolve interrelated disputes without recourse to complex and expensive litigation. That process, in turn, benefits the claimants as a whole by preventing wasteful application of the estate's assets toward the determination, rather than payment, of claims.

B. In this case, the district court dismissed Coit's suit for lack of subject matter jurisdiction based on the Fifth Circuit's reasoning that failure to exhaust deprives a court of jurisdiction. We believe that where, as here, a creditor's suit is already pending in court when the Bank Board appoints FSLIC as receiver, the claimant's obligation to exhaust the administrative claims process does not deprive the court of jurisdiction. The court should either dismiss the action without prejudice to renewal following exhaustion or stay the action pending exhaustion. We therefore suggest that it would be appropriate for this Court to vacate the court of appeals' decision with directions to remand the case to the district court for consideration whether to dismiss the action without prejudice or to stay the action pending Coit's completion of the administrative claims process.

C. Coit presents a series of constitutional objections to the Bank Board's administrative claims process premised on the notion that the Bank Board has authorized FSLIC to "adjudicate" claims. The court of appeals properly dismissed those claims as unripe. We believe that, in any event, the power conferred by HOLA and the NHA should not be characterized as a power of "adjudication." Hence, even if Coit's constitutional objections were ripe, they would have no bearing on the proper resolution of this dispute.

ARGUMENT

ONCE THE FEDERAL HOME LOAN BANK BOARD PLACES AN INSOLVENT FEDERAL SAVINGS AND LOAN ASSOCIATION IN RECEIVERSHIP, A CREDITOR MUST PRESENT HIS CLAIM AGAINST THE ASSOCIATION TO FSLIC AND EXHAUST THE ADMINISTRATIVE PROCEDURES FOR ALLOWANCE BEFORE PURSUING A JUDICIAL RESOLUTION OF THE CLAIM

Congress gave the Bank Board virtually complete responsibility for the liquidation of federal savings and loan associations. An S&L cannot seek protection under the bankruptcy laws (11 U.S.C. (& Supp. IV) 109). Instead, Congress gave the Bank Board "power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations * * * and for the conduct of conservatorships and receiverships" (12 U.S.C. 1464(d)(11)). And Congress gave FSLIC broad-ranging powers to act as receiver in connection with the liquidation of federally chartered S&Ls, subject only to the regulation of the Bank Board (12 U.S.C. 1729(d)). Con-

gress expected that these broad grants of power to expert agencies would provide a swift, efficient method of liquidating S&Ls, would maintain public confidence in those institutions, and would serve the best interests of depositors, other creditors, and the public.

The Bank Board has adopted regulations requiring that all claims against an S&L in receivership must be presented to FSLIC for examination in the first instance and to the Bank Board for review of any decision with which the claimant is dissatisfied. The Bank Board has consistently taken the position that this process must be exhausted before a claimant may press its claim in any other forum. The establishment of this process and the requirement that it be exhausted are not only well within the Bank Board's plenary authority to make rules and regulations governing liquidations and receiverships, they are indispensable to the fair and efficient conduct of those proceedings.

The Bank Board had numerous reasons for insisting that the receiver have the first opportunity to resolve all claims. FSLIC should not be forced to engage in even preliminary litigation of claims it may be prepared to pay or settle. FSLIC will have some familiarity with the affairs of the debtor because of its insurance and regulatory activities, and it will quickly gain more detailed familiarity in the exercise of its receivership responsibilities; as a result, the receiver is well situated to evaluate claims efficiently, to give comparable claims similar treatment, and to deal fairly with related or competing claims. And because of its familiarity with the overall condition of the estate, the receiver can deal with claims against an insolvent debtor in light of a realistic assessment of their likely worth as demands upon the limited pool of assets comprising the receivership estate.

Funneling all claims through the receiver enables the receiver to assess the overall conditions of the receivership;

to decide how many and which claims it should settle; to allow claimants (who hold competing claims against the S&L's limited assets) to participate appropriately in the evaluation of others' claims; and to make prompt partial distributions when the size and nature of disputed claims have been determined. The Bank Board's administrative claims process thus contributes immeasurably to an orderly liquidation. Allowing each claimant to bypass this procedure and initially press his claim in any otherwise available court or other forum, wherever located, at any time of the claimant's choosing within the applicable statute of limitations, would be—and the word is not too strong—a disastrous way to resolve an insolvent institution's affairs.

Coit and its amici direct their arguments to the conceptual question whether Congress has granted FSLIC "authority to adjudicate creditor claims" (Pet. Br. 8), a question they believe the Fifth Circuit decided in *North Mississippi Savings & Loan Ass'n* v. *Hudspeth, supra*. But while the *Hudspeth* opinion strongly suggested that FSLIC has that power, *Hudspeth*'s narrow holding did not necessarily reach that far.[12] Whatever the scope of the

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[12] The Fifth Circuit affirmed a district court's dismissal of Hudspeth's lawsuit alleging breach of an employment contract on the ground that Section 5(d)(6)(C) of HOLA (12 U.S.C. 1464(d)(6)(C)) "prevents him from going forward in any court before seeking [Bank Board] review" (756 F.2d at 1103). The court did not specifically hold that FSLIC has adjudicatory power, but it did state that the Bank Board's view that FSLIC is empowered to decide claims as part of its receivership function is "entitled to our deference" (*ibid.*) and that "Hudspeth can challenge the FSLIC's action before the [Board], and if unsatisfied, can seek judicial review under the [Administrative Procedure Act]" (*ibid.*). The Ninth Circuit has since read *Hudspeth* as validating the Bank Board's position that FSLIC possesses adjudicatory authority and has ruled, in response, that "FSLIC has no power to adjudicate creditor claims." *Morrison-Knudsen Co.* v. *CHG Int'l, Inc.*,

Hudspeth decision, we seek to defend the decision in the present case only on the ground that the Bank Board and FSLIC plainly do have power to require claimants first to present their claims to FSLIC, and exhaust the administrative process leading to allowance, settlement, or disallowance, before pursuing such judicial remedy as may then be available.[13]

Our contention is that the Bank Board has acted within its authority by requiring creditors to present their claims to FSLIC and exhaust the administrative procedures under which FSLIC and the Bank Board decide whether to allow, compromise, or disallow each claim.[14] If a claimant

811 F.2d 1209, 1218 (9th Cir. 1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates,* No. 87-451 (filed Sept. 17, 1987). The Fifth and Ninth Circuits now view themselves in square conflict on this question. Compare *ibid.* with Pet. App. A2.

[13] The Bank Board, litigating this case below independently of the Justice Department under 12 U.S.C. 1464(d)(1), has asserted that the process of allowing or disallowing claims is an administrative "adjudication" subject to judicial review under the Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 701 *et seq.* The Solicitor General does not endorse that position; instead, he defends the judgment below to the extent that it requires a creditor to present his claim to FSLIC and exhaust the claims review process before suing on the claim.

[14] The Solicitor General accordingly petitioned for a writ of certiorari in *FSLIC* v. *Stevenson Associates,* No. 87-451 (filed Sept. 17, 1987) and *FSLIC* v. *Murdock-SC Associates,* No. 87-452 (filed Sept. 17, 1987) and acquiesced in a petition for a writ of certiorari in *Zohdi* v. *FSLIC,* No. 87-255 (filed Aug. 5, 1987) to address the following question:

> Whether claims against the assets of an insolvent federally insured savings and loan association must be presented in the first instance in federal receivership proceedings in accordance with the Federal Home Loan Bank Board's regulations for the administrative resolution of such claims.

As we explained at the petition stage here (Memorandum for the Respondent 2), this same question controls the present case.

has properly presented his claim in accordance with the Bank Board's regulations and FSLIC and the Bank Board have determined to disallow it, the claimant may then bring suit and obtain a judicial resolution of the claim. In such a case FSLIC would generally expect to contend that the plaintiff is limited to the claim he presented to FSLIC and the Board (and must rely on the legal theory and evidence he offered in its support). The procedures followed and determinations reached in the administrative process may of course bear upon and constrain the judicial resolution in various ways. But petitioner's contention that the process prescribed by the Bank Board's regulations will deprive it of its day in court is both premature and wrong.[15]

A. The Bank Board Has Authority To Require That All Creditors Of A Federal Savings And Loan Association That Is In Receivership Submit Their Claims To FSLIC, As Receiver, For Allowance Or Disallowance, Before Pursuing A Judicial Remedy

1. The Great Depression prompted Congress to enact a series of statutes, chiefly HOLA and the NHA, that authorize the Bank Board and FSLIC to create, oversee, and liquidate the affairs of federal savings and loan associ-

[15] It should be noted that petitioner's claim is, purely, a pre-receivership claim against the insolvent S&L. The case would be altogether different if petitioner were challenging, in whole or in part, the receiver's exercise of its own powers and discretion. HOLA and the NHA make it clear that in respect of the exercise of its own powers as receiver, FSLIC is answerable only to the Bank Board. See page 5, *supra.* This Court ruled long ago that the actions of the Comptroller of the Currency and a receiver appointed by him, in resolving the affairs of an insolvent national bank, are subject to challenge only for bad faith or fraud. *Adams* v. *Nagle,* 303 U.S. 532, 540-542 (1938). There is no reason why the Bank Board's and FSLIC's actions should be subject to challenge on any lesser ground.

ations. See pages 2-3, *supra*. As this Court has explained, "Congress delegated to the Board broad authority to establish and regulate 'a uniform system of [savings and loan] institutions where there are not any now' " (*Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 166 (1982) (citation omitted)), and "the Board has exercised that discretion, regulating comprehensively the operations of these associations" (*id.* at 166-167). This comprehensive scheme of federal regulation extends from the association's " 'cradle to its corporate grave' " (*id.* at 145 (citation omitted)).

One of the most important responsibilities of the Bank Board and FSLIC is to settle the affairs of failed associations expeditiously and fairly. An S&L is not eligible to become a bankrupt. Instead, Section 5(d) of HOLA, as amended, empowers the Bank Board to reorganize or liquidate an insolvent federal association, using FSLIC as receiver for that purpose (12 U.S.C. (& Supp. IV) 1464(d)(6)(A) and (D)). The Board has "exclusive power and jurisdiction to appoint a conservator or receiver" (12 U.S.C. (Supp. IV) 1464(d)(6)(A)). "If in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association" (12 U.S.C. (Supp. IV) 1464(d)(6)(A)).

Under HOLA and the NHA, an S&L receivership is a fundamentally administrative--not a judicial--process. The Board has responsibility for setting the rules—even the most basic ones—under which receiverships are conducted. HOLA provides in the broadest terms that the Board "shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, * * * and for the conduct of conservatorships and receiverships * * *" (12 U.S.C.

1464(d)(11)). Furthermore, no court may interfere with the exercise of the receiver's powers: "[e]xcept as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver" (12 U.S.C. 1464(d) (6)(C)). As this Court observed with respect to the Bank Board's similarly worded authority to regulate lending practices, " 'it would have been difficult for Congress to give the Bank Board a broader mandate' " (*de la Cuesta*, 458 U.S. at 161 (citation omitted)). "Congress set out the general framework and left many of the details to the Board" (*id.* at 164). See *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947).[16]

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[16] Congress's choice of a statutory receivership as a means of liquidating failed associations had historical antecedents. The equity courts originated the concept of a receivership as a means for administering property subject to the court's jurisdiction, and court-conducted receiverships assumed importance in the 19th century as a means of reorganizing and liquidating financially embarrassed business entities, especially railroads. See, *e.g.*, 1 R. Clark, *A Treatise on the Law and Practice of Receivers* 4-5, 13-14 (3d ed. 1959); 3 R. Clark, *supra*, at 1560-1561. When Congress authorized the federal chartering of national banks, it adopted the receivership concept as the statutory mechanism for liquidating failed institutions (*id.* at 1601-1602) and later specified that the Federal Deposit Insurance Corporation would serve as receiver (*id.* at 1671-1675). See generally 12 U.S.C. 191 *et seq.*; 12 U.S.C. 1821. Under this statutory receivership scheme, "the receiver acts as an agent or agency or officer of the government and not as an officer of the court" (3 R. Clark, *supra*, at 1675-1676). See *In re Chetwood*, 165 U.S. 443 (1897). Thus, HOLA and the NHA were written against the backdrop of preexisting statutory receivership law. See H.R. Rep. 1922, 73d Cong., 2d Sess. 4 (1934) ("Adequate provision is made for the liquidation of insured institutions somewhat similar to the plan for the liquidation of banks which are under Federal deposit insurance."). Accord *Fahey* v.

The NHA sets out FSLIC's authority to conduct a statutory receivership in similarly broad terms and makes clear that it is the Bank Board alone to which FSLIC is responsible in carrying out its receivership functions. FSLIC, acting as receiver, "is authorized—(i) to take over the assets of and operate such association; (ii) to take such action as may be necessary to put it in a sound solvent condition; (iii) to merge it with another insured institution; (iv) to organize a new Federal association to take over its assets; (v) to proceed to liquidate its assets in an orderly manner; or (vi) to make such other disposition of the matter as it deems appropriate; whichever it deems to be in the best interest of the association, its savers, and the Corporation * * * " (12 U.S.C. 1729(b)(1)(A)). Congress specified that, in carrying out its liquidation responsibilities, FSLIC "shall have the power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necesary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board * * * " (12 U.S.C. 1729(d)). Congress also plainly contemplated that FSLIC as receiver would process the claims against the S&L. Congress instructed FSLIC to "pay all valid credit obligations of the association" (12 U.S.C. 1729(b)(1)(B)), imposing a statutory obligation that would be superfluous if the receiver were expected to await a court's instruction to pay each claim.

Mallonee, 332 U.S. 245, 250 (1947). See also, *e.g.*, G. Glenn, *The Law Governing Liquidation* 391-412 (1935); Note, *Legislation: Statutory Control Over the Dissolution of Building and Loan Associations*, 35 Colum. L. Rev. 265 (1935); Note, *The Appointment of Receivers for National Banks*, 44 Harv. L. Rev. 618 (1930). One difference between thrift and national bank liquidations is that that National Bank Act expressly assumes that creditors may present their claims for court determination. See 12 U.S.C. 194. The NHA does not.

2. The Bank Board's broad authority under Section 5(d)(11) of HOLA to establish rules for the conduct of receiverships, read in light of FSLIC's broad responsibility to liquidate a failed association "in an orderly manner" (12 U.S.C. 1729(b)(1)(A)(v)) and to "pay all valid credit obligations" (12 U.S.C. 1729(b)(1)(B)), clearly includes the power to establish a mandatory procedure for FSLIC determination and Bank Board review of creditor claims. Indeed, without such a procedure, FSLIC could hardly perform its receivership function.

The creditors of an insolvent S&L have competing claims against a common pool of assets that is, by hypothesis, insufficient to pay all claims. Moreover, the creditors frequently have complex relationships with the association and other creditors; they may be both borrowers and lenders (or shareholders); may have joint or competing interests in specific assets; may have jointly participated as borrowers or lenders; or have provided financing to one another. Thus, it is widely agreed that FSLIC cannot liquidate a failed association "in an orderly matter" unless it has an efficient mechanism for identifying all creditors, sorting out their relationships, and determining the nature, size, and likely validity of their claims against the estate. See *Morrison-Knudsen Co.* v. *CHG Int'l, Inc.*, 811 F.2d 1209, 1218 (9th Cir. 1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates*, No. 87-451 (filed Sept. 17, 1987).

Both efficiency and fairness require that all claims be channelled through FSLIC. A centralized process permits FSLIC to give like treatment to similarly situated creditors and, in some cases, to settle a group of like claims on similar terms. Where a number of claims arise from a single transaction (such as a construction financing, involving developers, contractors, and other lenders), FSLIC can evaluate those claims in relation to one

another. Perhaps most important, FSLIC can protect the interests of all creditors by making rational judgments about whether to settle or disallow claims. The actual value of a claim depends not only on its face amount and validity but also on the likely percentage recovery by claims in that class; in many cases, FSLIC cannot make a rational judgment whether to pay, compromise, or disallow a claim until it has had an opportunity not only to examine the claim's own factual and legal merits but also to assess the likely aggregate assets and liabilities of the receivership estate so as to estimate whether the cost of disallowing the claim and defending disallowance exceeds its true worth as an obligation of an insolvent debtor. This process is important to all creditors because the cost of litigating claims is an administrative expense of the estate.

The Bank Board acted both within its authority under Section 5(d) of HOLA and sensibly when it created a mandatory claims process that permits FSLIC to be informed of all claims against the receivership estate, to estimate their merit, and to resolve as many as possible without litigation. The Bank Board's regulations permit FSLIC to scrutinize each claim (see pages 6-11, *supra*), which in turn allows FSLIC to make a reasoned decision whether to recognize the claim as a valid obligation of the estate or to disallow the claim. See *Morrison-Knudsen Co.*, 811 F.2d at 1218 (emphasis omitted). ("The administrative process that the regulation prescribes authorizes FSLIC and the Board, by disallowance of a claim and notice to the claimant, to determine whether a dispute exists."). There is, we submit, no question under this Court's precedents that the Bank Board's creation of this administrative claims process is a valid exercise of its broad power under Section 5(d)(11) to make rules and regulations for the conduct of receiverships. See, *e.g.*, *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) (recognizing the

"well established" standard that a regulation promulgated under a broad grant of rulemaking power "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation' ") (quoting *Thorpe* v. *Housing Authority,* 393 U.S. 268, 280-281 (1969)).[17]

3. Coit appears to concede that the Bank Board's regulations give FSLIC "the right in the first instance to decide whether to pay or refuse to pay a claim" (Pet. Br. 25; see also *id.* at 26). It maintains, however, that it cannot be obligated to submit its claim to FSLIC and complete the Bank Board claims process before proceeding (or, in this case, proceeding further) in court. The core question in this case is therefore whether the Bank Board could lawfully require that claimants submit to and exhaust the administrative claims process as a condition to pursuing a judicial remedy. We submit that the answer is "yes."

The Bank Board's power under Section 5(d)(11) of HOLA to establish an administrative claims process necessarily includes the power to insist that creditors participate in and complete the administrative procedures before seeking judicial relief.[18] The point of the administrative

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[17] See also *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 744-745 (1984); *FCC* v. *Schreiber,* 381 U.S. 279, 292 (1965); *American Trucking Ass'ns* v. *United States,* 344 U.S. 298 (1953); *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 321-322 (1933).

[18] The Bank Board's regulations require presentation and exhaustion by providing that claimants must submit their claims in a timely manner (12 C.F.R. 549.4 (a)) and that only claims that were allowed by the receiver or approved by the Board shall be paid by the receiver (12 C.F.R. 549.4(d)). FSLIC therefore uniformly seeks dismissal of suits against the receivership estate where – as here – the claimant has failed to exhaust the claims process (see J.A. 27-29), and it has followed that practice since the advent of its regulations in 1941 (see note 19, *infra*). The Bank Board's interim claim procedures expressly state that judicial remedies are available only after exhaustion of the administrative procedures. 53 Fed. Reg. 13106 (1988).

claims procedure is to centralize the initial consideration of claims and to avoid resort to the courts with respect to the claims that FSLIC can resolve. These objectives are part of the statutory goal of liquidating the association "in an orderly manner" (12 U.S.C. 1729(b)(1)(A)(v)), and they would not be achieved if claimants could pursue court action without completing the claims process. It follows that the Board's requirement of presentation and exhaustion, like the creation of the claims process itself, is a valid exercise of its Section 5(d)(11) rulemaking power because it too is " 'reasonably related to the purposes of the enabling legislation.' " *Mourning*, 411 U.S. at 369 (quoting *Thorpe*, 393 U.S. at 280-281). Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975) ("The statutory scheme is thus one in which the [agency] may specify such requirements for exhaustion as [it] deems serve [its] own interests in effective and efficient administration.").[19]

[19] The Bank Board has consistently imposed this exhaustion requirement since its original promulgation of its receivership regulations in 1941 (6 Fed. Reg. 4413)). For example, FSLIC was sued, in circumstances resembling those in *Hudspeth*, shortly after the promulgation of the regulations in connection with the liquidation of Community Federal Savings & Loan Association. FSLIC contested that suit on the ground, among others, that the claimant "had not filed with the receiver his claim in accordance with notice to all creditors, duly published, and that the failure to do so barred the maintenance and prosecution of this action * * *." *Community Federal Savings & Loan Ass'n* v. *Fields*, 128 F.2d 705, 706 (8th Cir. 1942). The claimant responded that a FSLIC agent had orally denied the validity of the claim and that "this oral denial estopped the defendants from asserting the failure to file the claim with the receiver in bar of the prosecution of the suit" (*id.* at 707). The court found that the claim was invalid on its face, and therefore did not address the exhaustion issue (*id.* at 709). FSLIC's defense and the claimant's response demonstrate, however, that FSLIC and S&L creditors have long understood FSLIC's regulations to impose a presentation and exhaustion requirement.

To be sure, HOLA itself does not say, in terms, that claimants must present their claims to the receiver and exhaust that process before proceeding in court. But it does make clear that courts are not to "restrain or affect" the receiver's exercise of its functions: "[e]xcept as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver [appointed by the Bank Board], or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver" (12 U.S.C. 1464(d)(6)(C)). As Coit concedes (Pet. Br. 12-13), the express statutory functions of the receiver include the duty to "liquidate [the estate's] assets in an orderly manner," the power to "settle, compromise or release claims," and the power "to do all other things that may be necessary in connection therewith." See 12 U.S.C. 1729(a), (b), and (d). The Bank Board has determined that FSLIC cannot effectively perform its functions if it must confront claims in the first instance through litigation in any court available to any claimant. Conversely, it is no stretch whatever to conclude that forcing the receiver to litigate individual claims (and use the estate's assets to do so) before it has had an opportunity to assess those claims in relation to the situation of the estate as a whole would "affect" the receiver's exercise of its lawful functions. The effect of Section 5(d)(6)(C) therefore is to prohibit judicial proceedings on a creditor's claim until FSLIC has had an opportunity to determine, in accordance with its mandatory adminsitrative claims process, whether to pay, settle or disallow the claim.[20]

[20] Coit's citations (Pet. Br. 16-17) to *Morris* v. *Jones*, 329 U.S. 545 (1947), and *Riehle* v. *Margolies*, 279 U.S. 218 (1929), are, in this context, misplaced. *Morris*, which relies on *Riehle*, states that a Missouri lawsuit against an Illinois insurance company undergoing liquidation in an Illinois court does not amount to a "challenge to the possession

This is a case where the statutory language, while not specific, is dispositive because of the breadth of the shield that it places around the agency's discretion to devise the means by which it will carry out its broad mandate. HOLA authorizes the Bank Board to devise the basic design of the receivership process and specifies that the Bank Board supervises and regulates the receivership; the NHA defines the powers and functions of the receiver; and HOLA prohibits a court from taking any action that would "restrain or affect" the exercise of those powers and functions. There is nothing in the sparse legislative history of Section 5(d)(6)(C) to indicate that this provision was meant to provide anything short of the broad shield its plain language suggests.[21]

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of the liquidator" because "[t]he establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court" (*Morris*, 329 U.S. at 548, 549). The issue in the present case, however, is not possession. It is whether a claimant's suit to establish the amount of the claim would "restrain or affect" FSLIC's express authority under the NHA and the Bank Board's regulations to determine whether to pay the claim without litigation. Moreover, the Court indicated in both *Morris* and *Riehle* that the common law rule identified in those cases can be modified by federal statute. See *Morris*, 329 U.S. at 552-553 (citing bankruptcy practice); *Riehle*, 279 U.S. at 228 (accord).

[21] Congress added Section 5(d)(6)(C) to HOLA in 1966 as part of a general revision to clarify and expand the scope of the Bank Board's powers. See Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, Tit. I, § 101(a)(9), 80 Stat. 1034. The Senate Committee's section-by-section analysis states that Section 5(d)(6)(C) "would, in effect, limit the jurisdiction of a court to order the removal of a conservator or receiver, except in an action for removal brought by an association under authority of [Section 5(d)(6)(A)] * * * or, except at the instance of the Board, to restrain the exercise of the powers or functions of a conservator or receiver." S. Rep. 1482, 89th Cong., 2d Sess. 14 (1966); see also 112 Cong. Rec. 6891 (1966) (setting forth the Bank Board's identical description). The House Committee's report does not discuss the provision. See H.R. Rep. 2077, 89th Cong., 2d Sess. (1966).

4. There is nothing novel in requiring potential litigants to pursue and exhaust their administrative remedies before seeking judicial relief. The Court has repeatedly recognized the "well established" doctrine " 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' " *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). As the Court has explained, in "cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). "This is so even though the facts after they have

Congress further amended HOLA in 1968 to authorize the Bank Board to appoint FSLIC as receiver for federally-insured state-chartered institutions. Bank Protection Act of 1968, Pub. L. No. 90-389, 82 Stat. 294. The accompanying Senate report categorically reiterated that "Section 5(d)(6)(C) provides that no court may * * *, except at the instance of the Board, restrain or affect the exercise of powers or functions of a receiver." S. Rep. 1263, 90th Cong., 2d Sess. 10 (1968). It specifically observed in the following sentence that the NHA authorizes FSLIC, as receiver, to liquidate institutions "in an orderly manner," adding (*ibid.*):

> In carrying out its receivership responsibilities, the committee expects the FSLIC to give due consideration to the interest of all of the claimants upon the assets of the association * * *. The authority of the FSLIC in this regard would be subject only to the regulation of the Federal Home Loan Bank Board and not to that of any State authority, administrative or judicial, which may previously have had regulatory authority with respect to the institution.

Thus, the Senate Committee understood that Section 5(d)(6)(C) would prohibit courts from interfering with FSLIC's administrative consideration of claims.

been appraised by specialized competence serve as a premise for legal consequences to be judicially defined" (*ibid.*). All of the familiar principles of administrative law that ordinarily support a requirement of exhaustion are reinforced, in the receivership context, by the fact that claims are against a common pool of assets that must bear the cost of litigating the validity of any particular claim.

As the Court has stated, "[t]he basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi* v. *Davidson,* 405 U.S. 34, 37 (1972) (citations omitted). In the receivership context, where claims are likely to be of kinds with which the Bank Board and FSLIC has repeated experience, and where specific facts and circumstances often have a common bearing on groups of claims or all claims, this consideration has even more than its usual force.

The Court has also observed that "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" (*Far East Conference,* 342 U.S. at 574-575). "Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene" (*McKart,* 395 U.S. at 195). Again, the circumstances of a receivership reinforce these points in several ways. Uniformity and consistency are

especially important when claimants have similar or related claims against a common and limited pool of assets. And efficiency in the receivership context conserves not only the judiciary's resources but the asset pool itself. Claimants obviously have a strong interest in conserving the receivership assets for their mutual benefit through efficient resolution of each other's claims.

"Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures" (*McKart,* 395 U.S. at 195). This is perhaps the most forceful point of all. A receivership is an arena in which the "squeaky wheel" principle, if not checked, would often afford the most favorable outcomes to those who can most effectively threaten to delay the process and impose unnecessary costs. Without the Bank Board's centralized claims process the division of the common and limited pool of assets would too often depend on which claimant could force the most favorable settlement by threatening to impose on the estate the procedural costs and delays of litigation in another forum.

The Bank Board's requirement that claimants exhaust the administrative claims process is consistent with the factors generally identified as supporting exhaustion.[22] For

[22] For example, Professor Davis cites the following considerations as supporting exhaustion:

> [1] need for factual development, [2] importance of reflecting agency's expertise or policy preferences in the final result, [3] probability that the agency will satisfactorily resolve the controversy without judicial review, [4] protection of agency processes from impairment by avoidable interruption, [5] conservation of judicial energy by avoiding piecemeal or interlocutory review, and [6] providing the agency opportunity to correct its own errors.

4. K. Davis, *Administrative Law Treatise* § 26:1, at 415 (2d ed. 1983). See 5 B. Mezines, J. Stein & J. Gruff, *Administrative Law* § 49.01 (1987).

example, FSLIC is normally in the best position to "develop the necessary factual background upon which decisions should be based" (*McKart*, 395 U.S. at 194). FSLIC must come to understand the circumstances of the estate, and often must in any event learn much about the circumstances relevant to the factual merits of a particular claim. The decision whether to pay, settle, or disallow a claim will then often require agency exercise of discretion and expertise.[23] Finally, claimants frequently are "successful in vindicating [their] rights in the administrative process" (*McKart*, 395 U.S. at 195). FSLIC's experience indicates that the administrative claims process results in the satisfactory resolution of many creditor claims, through allowance or settlement, without the need for

[23] FSLIC has special expertise as to the vast majority of contested claims against receivership assets. These claims tend to involve transactions and legal questions that are the subjects of Bank Board regulations. See, *e.g.*, 12 C.F.R. 545.32-545.53, 563.9-3 (regulating loan practices); 12 C.F.R. 563.9-8 (regulating real estate transactions); 12 C.F.R. 563.5, 563.7-2, 563.7-4, 563.7-5, 563.8-1, 563.13-2, Pts. 563d, 563g (regulating issuance of securities). For example, a substantial percentage of disputed claims both in number and dollar terms arise out of loan participation agreements. These agreements arise when more than one lender is involved in making a loan; such loans often tend to be quite complicated transactions. See Drake & Weems, *Mortgage Loan Participations: The Trustee's Attack*, 52 Am. Bankr. L.J. 23 (1978); Stahl, *Loan Participation: Lead Insolvency and Participants' Rights (Part I)*, 94 Banking L.J. 882 (1977). S&Ls often enter into participation loans as a means of complying with the Bank Board's regulations limiting the amount any one S&L can lend to a single borrower. See 12 C.F.R. 563.9-3. In regulating ongoing S&Ls, therefore, FSLIC and the Board constantly review participation loan agreements for their consistency with the regulations, and the Board even issues advisory opinions on the subject. FSLIC and the Board are thus thoroughly familiar with the various permutations of participation loans and are well-suited to evaluate claims arising from such loans.

judicial proceedings. For example, in the FirstSouth liquidation, FSLIC has thus far reviewed 435 claims and has allowed in full or in part, 150 of those claims. Many of the remaining claims may be susceptible to settlement.[24]

None of the commonly cited reasons for *not* requiring exhaustion is applicable here.[25] Claimants suffer no irreparable injury by virtue of being required to exhaust administrative remedies.[26] There is no basis for contending

[24] *McKart* also identified a separation of powers justification for exhaustion. The exhaustion doctrine is, in part, " 'an expression of executive and administrative autonomy' " (*McKart*, 395 U.S. at 194, quoting L. Jaffe, *Judicial Control of Administrative Action* 425 (1965)). "The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction" (395 U.S. at 194). "This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise" (*ibid.*). Thus, exhaustion is especially appropriate here, where Congress has given the Bank Board and FSLIC plenary authority over S&L liquidations.

[25] Professor Davis cites the following factors as supporting an exception to the principle of exhaustion:

> [1] irreparable injury to a party from pursuing the administrative remedy, [2] clear absence of agency jurisdiction, [3] clear illegality of the agency's position, [4] a dispositive question of law peculiarly within judicial competence, [5] the futility of exhaustion, and [6] expense and awkwardness of the administrative proceeding as compared with inexpensive and efficient judicial disposition of the controversy.

4 K. Davis, *supra*, § 26:1, at 414-415. See also 5 B. Mezines, J. Stein & J. Gruff, *supra*, § 49.02.

[26] Exhaustion, of course, may or may not in a particular instance delay the resolution of a particular claimant's claim; but the timing of payment will generally depend on the efficiency with which the receiver can resolve all claims sufficiently to permit a distribution to creditors. The Bank Board's regulations also provide avenues for relief in the event that submission to the administrative claims process

that FSLIC "lacks jurisdiction" or has taken a "clearly illegal position": FSLIC is clearly entitled to an opportunity to evaluate claims and, indeed, it cannot have a position – legal or otherwise – until it has the opportunity to evaluate each claim. FSLIC rarely finds itself faced with "a dispositive question of law peculiarly within judicial competence." In fact, many claims are highly fact-oriented, or involve legal issues with which FSLIC and the Bank Board have special expertise, or both. Nor is exhaustion futile. Many, if not most, claims are allowed in full or settled during the administrative process. Finally, the administrative process is not more expensive and awkward than judicial disposition of the controversy. In many cases, it will eliminate the need for judicial resolution; in the remaining cases it will, often, eliminate the need for discovery by establishing facts not in contention, narrowing the issues and the defining the precise contours of the dispute.[27]

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should result in extraordinary hardship. The regulations expressly provide for expedited or emergency relief upon a showing of likelihood of success on the merits and irreparable harm. See *Instructions* 1; *Procedures for the Administration and Determination of Requests for Expedited Relief from Decisions or Threatened Actions of the FSLIC as Receiver*, 53 Fed. Reg. 13112-13113 (1988). The Bank Board's denial of such emergency relief is subject to judicial review (*id.* at 13113).

[27] Coit provides no persuasive basis for believing that resort to the administrative process will generally delay the final resolution of creditor claims. Coit's only support (Pet. Br. 22 n.19) is the isolated case of amicus Hudspeth's claim, which has been pending with the receiver for two and one-half years. See also Hudspeth Amicus Br. 5-8. Hudspeth's situation is hardly typical of the administrative process. For example, of the 103 claims filed against the Liberty Federal S&L receivership, which had a claims deadline of December 10, 1987, 63 have already been resolved. These 63 claims took an average of only 47 days to resolve. This Court need look no further than its own docket for additional evidence of the efficiency of the administrative process. The claimants in *Morrison-Knudsen Co.* v. *CHG, Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates*, No. 87-451 (filed Sept. 17, 1987), all brought their claims to the administrative forum, where settlements were quickly reached. (Accordingly, the Solicitor General intends to ask the Court to dismiss that petition as moot.)

In sum, all of the generally recognized factors favoring exhaustion are present here and all of the factors favoring an exception to exhaustion are absent. Even Coit has conceded (Pet. Br. 26) that "FSLIC has the right in the first instance to decide whether to pay or refuse to pay a claim; and the Board can overrule FSLIC's decision just as the management of an insurance company can overrule the decision of a claims adjuster. However, if the ultimate administrative decision is not to pay, the resulting dispute must then be resolved by the courts." This is an exhaustion requirement, plain and simple.[28]

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[28] It is also instructive that even the Ninth Circuit, which otherwise disagreed with FSLIC's position, has recognized that FSLIC's "interest in applying its expertise, correcting its own errors, making a proper record, and maintaining an efficient, independent administrative system" justifies imposing an exhaustion requirement in particular cases. See *Morrison-Knudsen Co.* v. *CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates*, No. 87-451 (filed Sept. 17, 1987). The Ninth Circuit erred, however, in believing that the salutary purposes of the exhaustion doctrine could be achieved simply by requiring lower courts to determine whether exhaustion should be required on a case-by-case basis. Forcing FSLIC to litigate the exhaustion question in every case would foster uncertainty, waste administrative and judicial resources, disrupt the administration of the receivership, and lead to precisely the same problems as the exhaustion requirement is designed to prevent.

B. The District Court Should Either Have Dismissed Coit's Suit Without Prejudice Or Stayed The Action Pending Coit's Submission To And Exhaustion Of The Bank Board's Administrative Claims Process

As the foregoing discussion demonstrates, Congress has authorized the Bank Board to establish a regulatory scheme whereby FSLIC, as receiver of a failed S&L, determines through an administrative claims process whether to allow, settle, or disallow creditor claims against the receivership estate. If FSLIC agrees to allow the creditor's claim or a satisfactory settlement is reached, the matter is resolved without resort to the courts. Where, as here, a creditor's suit is already pending in court when the Bank Board appoints FSLIC as receiver, the need to exhaust the administrative remedy does not deprive the court of jurisdiction, and the court should either dismiss without prejudice to renewal of the claim at the end of the administrative process or stay its proceedings for that period.

As we have explained (pages 21-37, *supra*), the Bank Board's presentation and exhaustion requirement is binding on the courts by virtue of Section 5(d)(6)(C) of HOLA, which provides that "no court may * * * restrain or affect the exercise of powers or functions of a conservator or receiver" (12 U.S.C. 1464(d)(6)(C)), together with provisions of the NHA that identify FSLIC's receivership responsibilities and state that FSLIC shall carry out those functions "subject only to the regulation of the Federal Home Loan Bank Board" (12 U.S.C. 1729(d)). Federal and state courts must withhold action on creditor suits against an insolvent institution because obliging FSLIC to respond to such a suit before it has completed the claims process prescribed by the Bank Board would "restrain or affect" FSLIC's exercise of its powers and the discharge of its function to determine, in accordance with the Bank

Board's regulations, whether to pay, settle, or disallow creditor claims.

In this case, FSLIC removed Coit's pending state suit to federal district court pursuant to 12 U.S.C. 1730(k)(1)(C), which gives FSLIC the right (with an exception not here relevant[29]) to remove any civil suit to which it is a party. FSLIC then moved to dismiss on alternative grounds, citing both a lack of subject matter jurisdiction and Coit's failure to state a claim on which relief could be granted. See J.A. 27. The district court apparently believed that the Fifth Circuit's *Hudspeth* decision, which implicitly ruled that lack of exhaustion deprives a court of jurisdiction, required it to dismiss on the former ground. In the Solicitor General's view, it is not accurate to say that Section 5(d)(6)(C) limits the subject-matter jurisdiction conferred by 12 U.S.C. 1730(k)(1).[30] Rather, it prohibits a court, vested with jurisdiction over the cause, from taking action or giving relief that would interfere with the receiver's functions. We therefore suggest that it would be appropriate for this Court to vacate the court of appeals' decision with directions to remand the case to the district court for consideration whether to dismiss Coit's suit or to stay the action pending Coit's exhaustion of the Bank Board's administrative claims process.

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[29] A proviso to Section 1730(k)(1) excludes certain suits involving state-chartered institutions. The Solicitor General recently filed a petition for a writ of certiorari in a case involving the interpretation of the proviso to Section 1730(k)(1). See *FSLIC* v. *Ticktin*, No. 87-1865 (filed May 12, 1988).

[30] There is evidence supporting the jurisdictional approach. The 1966 Senate Committee that drafted and reported Section 5(d)(6)(C) tersely stated that the section "would, in effect, limit the jurisdiction of a court" to restrain the powers or functions of the receiver. S. Rep. 1482, 89th Cong., 2d Sess. 14 (1966). See note 21, *supra*.

C. Petitioner's Constitutional Challenges Are Not Properly Raised In This Case

Coit presents (Pet. Br. 35-50) a series of constitutional objections to the Bank Board's administrative claims process, arguing that resort to that process violates Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment's guarantee of the right to a jury trial. The court of appeals did not reach those objections. It concluded, quite properly, that the constitutional questions were "not yet ripe for resolution" (Pet. App. A4) because "FSLIC may allow all or some of Coit's claims, depriving Coit of standing and a grievance" (*ibid.*). See, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974); *Poe* v. *Ullman* 367 U.S. 497, 504-505 (1961); *Liverpool, New York & Philadelphia Steamship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

Coit's constitutional objections all rest on the premise that the Bank Board has authorized FSLIC to "adjudicate" claims. While we believe Congress would have considerable latitude to provide for administrative adjudication of claims against a federally chartered institution that has become insolvent, we do not believe that the power conferred by HOLA and the NHA should be characterized as a power of "adjudication." It is the power to pay valid claims, to settle claims, or to disallow and thereby contest claims. If contested, the claimant can take his claim to court for judicial resolution. Accordingly, even if they were ripe, Coit's constitutional objections would have no bearing on the proper resolution of this dispute.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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JUNE 1988

Section 5(d)(6)(C) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(6)(C), provides:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver [appointed by the Federal Home Loan Bank Board], or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

Section 5(d)(11) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(11), provides:

> The Board shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, for the merger of associations with associations or with any institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, for associations in conservatorship and receivership, and for the conduct of conservatorships and receiverships; and the Board may, by regulation or otherwise, provide for the exercise of functions by members, directors, or officers of an association during conservatorship and receivership.

Section 406 of the National Housing Act, 12 U.S.C. 1729, provides in relevant part:

* * * * *

(b) Powers of Corporation on default of Federal Savings and Loan Associations

(1) In the event that a Federal association is in default, the Corporation shall be appointed as conservator or receiver and as such –

(A) is authorized –

(i) to take over the assets of and operate such association;

(ii) to take such action as may be necessary to put in in a sound solvent condition;
(iii) to merge it with another insured institution;
(iv) to organize a new Federal association to take over its assets;
(v) to proceed to liquidate its assets in an orderly manner; or
(vi) to make such other disposition of the matter as it deems appropriate;

whichever it deems to be in the best interest of the association, its savers, and the Corporation; and
(B) shall pay all valid credit obligations of the association.

* * * * *

(d) Additional powers of Corporation

In connection with the liquidation of insured institutions, the [Federal Savings and Loan Insurance] Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

Pertinent regulations of the Federal Home Loan Bank Board provide in relevant part (12 C.F.R. 549.4):

(a) When directed to do so by the [Bank] Board, the receiver shall promptly publish a notice to the association's creditors to present their claims, with proof thereof, to the receiver by a date specified in the notice * * *. Claims filed after the specified date shall be disallowed, except as the [Bank] Board may approve them for whole or part payment from the association's assets remaining undistributed at the time of approval. The receiver shall mail a similar notice to any creditor shown on the association's books at the creditor's last address appearing thereon.

(b) The receiver shall allow any claim seasonably received and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor. * * * Unless, within 30 days after notice is mailed, the claimant files a written request for payment regardless of the disallowance, disallowance shall be final, except as the [Bank] Board may otherwise determine.

* * * * *

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No. 87-996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

v.

THE FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION,
AS RECEIVER OF FIRST SOUTH, F.A.,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF AMICUS CURIAE OF JOSEPH M. HUDSPETH IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF JOSEPH M. HUDSPETH IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Joseph M. Hudspeth was the defendant-appellant in the case of *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). That case was the first to address the issue raised in the case at bar: the authority of FSLIC, as Receiver, to adjudicate state law claims

against savings institutions in receivership. As a result of the Fifth Circuit's 1985 decision in *Hudspeth*, Mr. Hudspeth's legal claims were deferred to the FSLIC administrative forum, where they are still pending three years later. Mr. Hudspeth's state law claims remain viable under Mississippi law regarding limitations of actions. Accordingly, if Petitioner herein prevails, Mr. Hudspeth could pursue speedy judicial determination of those claims.

SUMMARY OF ARGUMENT

The questions presented here were first addressed in the case of *North Mississippi Savings & Loan v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). In holding that the FSLIC, as Receiver, has the exclusive authority to adjudicate state law claims against a savings institution in receivership, the Fifth Circuit Court of Appeals relied on its assumption that FSLIC adjudication of claims would expedite and facilitate resolution of those claims and the disposition of Receiverships. 756 F.2d at 1102. The identical result reached by the Fifth Circuit in the instant case was reliant on its earlier decision and assumption in *Hudspeth*.

Subsequent to the Fifth Circuit's ruling in *Hudspeth*, Amicus Curiae Joseph M. Hudspeth, the defendant-appellant there, has had the opportunity to test the validity of that assumption. Mr. Hudspeth submitted his Proof of Claim to the FSLIC on November 30, 1985. As of this date, he has not received the FSLIC's Receiver's Initial Determination. Thus, two and one-half years have elapsed, and Mr. Hudspeth is still at the relative beginning of the administrative process.

Therefore, one of the premises necessary to the Fifth Circuit's decision in *Hudspeth* is erroneous. Accordingly, the Fifth Circuit's decision in *Hudspeth* is unsound and, likewise its progeny, the instant case.

ARGUMENT

Whether the FSLIC, as Receiver, has the exclusive authority to adjudicate the validity of state law claims against a savings institution in receivership was first addressed in *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). The Fifth Circuit initially decided in favor of Mr. Hudspeth and held that Congress had given no such exclusive grant to the FSLIC:

> Nothing in the relevant statutes or legislative history indicates that the FSLIC has the power to adjudicate claims . . . .
>
> * * * *
>
> . . . [If] an action is based on the pre-receivership conduct of the failed institution, the debt due may be judicially established. . . .
>
> . . . Therefore, Hudspeth's demand for judicial establishment of Old North's obligation to him, should he wish to proceed with it, should be remanded to state court.

North Mississippi Savings & Loan Association v. Hudspeth, No. 85-294, slip. op. at 3485, 3486-87 (5th Cir. Apr. 5, 1985), *reh'g granted*, 756 F.2d 1096.[1]

On Petition for Rehearing, the FSLIC argued that the Fifth Circuit's decision would cause economic harm to FSLIC because of the delays encountered in adjudicating claims in state courts. Specifically, it contended that:

> Under the Court's ruling, adjudications of these claims may be inordinately delayed because damage

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[1] The initial opinion of the Fifth Circuit no longer appears in the Federal Reporter. However, a copy of the decision in its entirety is reprinted in Petition for Writ of Certiorari, Appendix B, *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096, *cert. denied*, 474 U.S. 1054 (1986) (Docket No. 85-294).

> claims against the receivership estate could be presented to state or federal courts, instead of to the receiver, for initial adjudication of their validity. . . . Under this scheme, many claims filed in 1985 might be resolved ultimately in the next century.

Plaintiffs-Appellees' Petition for Rehearing, at pp. 11-12, *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985) (footnote omitted).

If Mr. Hudspeth had only begun the administrative process in April 1983, the FSLIC further noted, "it is likely that his claim would already be resolved." [2] *Id.* at 12 n.7.

FSLIC further asserted that, contrary to the Fifth Circuit's initial holding, there was legislative history supporting adjudicatory power for the FSLIC. *Id.* at pp. 7, 8.

Without permitting a response brief from Mr. Hudspeth, the Fifth Circuit revised its opinion. On May 23, 1985, the Court granted the Petition for Rehearing and issued its revised opinion now appearing at 756 F.2d 1096.

In support of its revision, the Fifth Circuit relied on two premises which do not appear in its original decision. First of all, it changed its earlier view and accepted the contention that legislative history supported the grant of adjudicatory authority. That premise could

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[2] This argument made in April 1985, has also been demonstrated to be without merit. Two and one-half years into the process, Mr. Hudspeth is still far from having his claim resolved. On the other hand, in April 1983, discovery in the state court proceedings was near completion. The Lafayette County, Mississippi Chancery Court does not suffer from a congested docket. A trial setting for that Summer, or early Fall, was a certainty. Even if that court's judgment were subsequently appealed, such an appeal would surely have reached resolution long before 1988.

be, and was, shown to be mistaken at the time of the Court's decision.[3]

Secondly, the Court relied on its assumption that allowing FSLIC, as Receiver, to adjudicate claims would expedite claim resolution as well as the disposition of receiverships:

> [R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: The FSLIC would not be able to determine how much to pay other claimants until determination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as Receiver, such a delay is a "restraint" within the scope of the statute.

756 F.2d at 1102.

That assumption was not demonstrably erroneous at the time the *Hudspeth* decision was rendered, inasmuch as the FSLIC, as Receiver, had never previously adjudicated such claims.

Mr. Hudspeth, in claim No. 00-001-0001, has now tested in real life this second premise of the Fifth Cir-

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[3] The Court relied on the 1968 history of the Bank Protection Act, 756 F.2d at 1101 (citing S. Rep. No. 1263, 90th Cong., 2d Sess. 10, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2539) That history, however, was not the correct history for the determination of the Congressional intent underlying 12 U.S.C. §§ 1464 (d)(6)(c) and 1729(d). Instead, the legislative histories pertaining to the enactment of those statutes, in the form considered by the Court, appear at S. Rep. No. 1482, 89th Cong., 2d Sess. 1, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3532 and S. Rep. No. 536, 97th Cong., 2d Sess. 48, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3054, respectively. *See also* 78 Cong. Rec. H11192 (daily ed. June 12, 1934). Neither of the pertinent histories supports grant of adjudicatory power to the FSLIC, as Receiver. Mr. Hudspeth identified the Fifth Circuit's mistake in this regard in his subsequent petition to this Court. *See* Reply Brief of Petitioner, On Petition for Writ of Certiorari, at p. 3, *Hudspeth*.

cuit's revised opinion. His experience shows that the Fifth Circuit's assumption simply does not coincide with reality.

As the first step in the administrative process, Mr. Hudspeth submitted a "proof of claim" on November 27, 1985.[4] (App., pp. 1a-4a). As instructed by the form, the claim was forwarded to the attention of Mr. John Sears, Claims Representative. On December 4, 1985, Mr. Hudspeth wrote Mr. Sears requesting a hearing on his claim before any final determination was made. (App., p. 6a). He received no response and no hearing has ever been conducted.

The next communication Mr. Hudspeth received regarding his claim came almost seventeen (17) months later. On May 1, 1987, the Receiver issued its "Notice of Record" (App., p. 7a). Attached to the Notice was an index of the three-volume administrative record that had been compiled.[5]

Volume 1 of the record consists of the materials submitted by Mr. Hudspeth in November 1985. Volume 2 contains four summaries of interviews apparently conducted after the filing of Mr. Hudspeth's claim. Those summaries account for six pages of the record. Otherwise, Volume 2 consists of letters, notes and reports from the files of North Mississippi Savings & Loan Associa-

[4] Under protest, Mr. Hudspeth was required by the Receiver to submit his claim before the subsequent disposition of his Petition for Writ of Certiorari on January 13, 1986. The "proof of claim" form was mailed to Mr. Hudspeth without any other procedural or evidentiary guidelines by FHLBB attorney, Paul Grace. Grace had served as lead counsel arguing Appellees' position in oral argument in the Fifth Circuit.

[5] This index is part of the Administrative Record compiled in Mr. Hudspeth's claim No. 00-001-0001. Mr. Hudspeth assumes that the index, as well as the entire record, is a public record and remains available for inspection and copying at the address given in the Notice. (App., p. 7a).

tion, most of which had been produced in 1982 and 1983 during the course of discovery in the state court proceedings. Volume 3 of the record consists entirely of state court pleadings from both *Hudspeth* and the proceedings establishing the FSLIC's Receivership of North Mississippi Savings & Loan Association.

Thus, with the exception of four rather short interviews, all of the material in the record designated in May 1987 was available, and accounted for, when Mr. Hudspeth filed his claim in November 1985, one and one-half years before.

With permission from the Receiver, Mr. Hudspeth filed his supplementation of the Administrative Record on July 2, 1987, acknowledged by the Receiver on July 6, 1987. (App., p. 9a).

Almost six months then passed without further contact from the FSLIC. Then, on December 24, 1987, the Receiver issued its "Notice of Proposed Determination," disallowing Mr. Hudspeth's claim in full. (App., p. 10a).

Attached to the notice was a fifteen-page document in the nature of a "Findings of Fact and Conclusions of Law." The document was entitled "Proposed Determination," and signed by Mr. Sears as Special Representative for the FSLIC Receiver.

On March 3, 1988, Mr. Hudspeth filed a Request for Reconsideration[6] (App., p. 12a). Attached as exhibits to his request were Mr. Hudspeth's "Objections to Findings of Fact in Receiver's Proposed Determination" (ten pages) and his "Proposed Alternative Determination" (thirty-five pages).

At the same time, Mr. Hudspeth wrote Mr. Sears, asking again for a hearing on his claim. He further noted

[6] Mr. Hudspeth had asked for, and received an extension of the time provided for submitting this Request from January 24, 1988 until March 4, 1988.

that he had requested, but never received any sort of written procedures, rules or regulations as a guideline in submitting his claim. Mr. Sears responded on March 7, 1988, by forwarding a copy of *Procedures for the Administration and Determination of Claims Filed with the Receiver.*[7] (App., p. 13a).

As of May 2, 1988, Mr. Hudspeth's Request for Reconsideration is still pending, and the Receiver has not yet issued its "Initial Determination."

Two and one-half years, therefore, have now passed since Mr. Hudspeth began the administrative "adjudication" that the Fifth Circuit assumed would avoid delay. However, Mr. Hudspeth is still in the initial stages of what truly looks to be a process "ending ultimately in the next century."

Contrary to the assumption made by the Fifth Circuit, permitting the FSLIC to assume an adjudicatory role with regard to state law claims clearly does not expedite and facilitate the disposition of claims of the Receivership. Since that assumption was one of the major premises upon which the Fifth Circuit revised its initial ruling, the holding embodied in its revised opinion is rendered highly suspect.

CONCLUSION

Mr. Hudspeth respectfully requests that this Court reverse the judgment rendered by the United States Court of Appeals for the Fifth Circuit in this case and overrule the *Hudspeth* decision. The Fifth Circuit's reliance in this case on the *Hudspeth* Court's reasoning regarding expeditious claim resolution can find solid foundation

[7] A later comparison of the procedures sent with those published in the Federal Register shortly thereafter showed the copy sent by Sears to be different from those actually adopted. *See* Appendix-Procedures for the Administration and Determination of Claims filed with the FSLIC as Receiver, Conservators and Receivers: Interim Procedures, 53 Fed. Reg. 13105 (1988).

only if such can be found underlying the *Hudspeth* decision. It cannot. The relegation of Mr. Hudspeth's state law claims to FSLIC adjudication has shown that process, contrary to the assumption in *Hudspeth*, to be an administrative slough, "expedient" only in slowly swallowing claims until they must finally, and surely, disappear.

Respectfully submitted,

WYLENE W. DUNBAR
Counsel of Record
JACK F. DUNBAR
HOLCOMB, DUNBAR, CONNELL,
CHAFFIN & WILLARD
Post Office Drawer 707
Oxford, Mississippi 38655
(601) 234-8775
Attorneys for Amicus Curiae

APPENDIX

APPENDIX

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR NORTH MISSISSIPPI SAVINGS AND LOAN ASSOCIATION, OXFORD, MISSISSIPPI

PROOF OF CLAIM

1. *Claimant.* [If claimant is an individual claiming for himself] The address for the undersigned, who is the claimant herein, is *208 Country Club Road, Oxford, Mississippi 38655.*

[If claimant is a partnership claiming through a partner] The undersigned, whose business address is ———, is a general partner of ———, a partnership, and the partnership is doing business at ——— and the undersigned is authorized to make this proof of claim on behalf of the partnership which is the claimant.

[If claimant is a corporation claiming through an authorized officer] The undersigned whose business address is ———, is the ——— of ———, and the address of the corporation is ——— and the undersigned is authorized to make this proof of claim on behalf of the corporation which is the claimant.

[If claim is made by agent] The undersigned, whose business address is ———, is the agent of ———, and is authorized to make this proof of claim on behalf of the principal which is the claimant.

2. *Amount of Claim.* North Mississippi Savings and Loan Association, Oxford, Mississippi, ("North Mississippi") was on April 11, 1983, and still is indebted, or liable, to this claimant in the sum of $ [*See attachment designated "Amount of Claim"*]

3. *Consideration for Claim.* The consideration for this debt, or the ground of liability, is as follows:

[*See attachment designated "Consideration for Claim* (please attach additional pages if necessary). *and Ground of Liability".*]

4. *Written Evidence of Claim if claim is founded on a writing.* The writing on which this claim is founded or an authentic duplicate thereof is attached hereto or cannot be attached for the reason set forth in a statement attached hereto.

[See attachment designated "Contractual Writings"]

5. *Claim on Open Account if claim is founded on an open account.* This claim is founded on an open account, which became, or will become due on ———, as shown by the itemized statement attached hereto. Unless, it is attached hereto or its absence is explained in an attached statement, no note or other negotiable instrument has been received for the account or any part of it.

6. *Judicial Proceedings.* No judgment has been rendered on the claim except [*See attached sheet designated "Judicial Proceedings"*]

7. *Credits.* The amount of all payments on this claim has been credited and deducted for the purchase [sic] of making this proof of claim.

8. *Absence of Setoff or Counterclaim.* This claim is not subject to any setoff or counterclaim except as may be described in a statement attached hereto.

9. *Absence of Security Interest.* No security interest is held for this claim except as may be described in a statement attached hereto. The undersigned claims the security interest under the writing referred to in paragraph 4 hereof or under a separate writing a duplicate of which is attached hereto, or under a separate writing which cannot be attached hereto for the reason set forth in a statement attached hereto. Evidence of perfection, if

any, of such security interest is also attached hereto. [See "*" below]

10. *General, Unsecured Nature of Claim.* This claim is a general, unsecured claim, except to the extent that the security interest, if any, described in paragraph 9 is sufficient to satisfy the claim. [See "*" below]

This claim is filed as a (n) unsecured,* secured, priority [*strike whichever terms are inappropriate*] claim.

Dated: November 27, 1985

/s/ Joseph M. Hudspeth
Signature of Claimant

THE PENALTY FOR MAKING ANY STATEMENT KNOWN TO BE FALSE FOR THE PURPOSE OF INFLUENCING IN ANY WAY THE ACTION OF THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IS A FINE OF NOT MORE THAN $5,000.00 OR IMPRISONMENT FOR NOT MORE THAN TWO YEARS, OR BOTH. 18 U.S.C. § 1008.

THE PRIORITY OF THIS CLAIM WILL BE DETERMINED IN ACCORDANCE WITH 12 C.F.R. § 569a.7. ALLOWANCE AND PAYMENT OR DISALLOWANCE OF THIS CLAIM WILL BE MADE IN ACCORDANCE WITH 12 C.F.R. 569a.8. THESE REGULATIONS ARE INCORPORATED HEREIN BY REFERENCE.

THIS PROOF OF CLAIM MUST BE SUBMITTED ON OF BEFORE SEPTEMBER 19, 1985** TO FEDERAL

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* Under the laws of Mississippi, Mr. Hudspeth's claim does impose an equitable lien on the assets of Old North which follows the assets to subsequent transferees in interest, as more fully set forth in the attachments hereto.

** This deadline was extended to November 30, 1985. (See letter of September 19, 1985, to Wylene W. Dunbar, Esq., from Paul W. Grace) (copy attached).

SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR NORTH MISSISSIPPI SAVINGS AND LOAN ASSOCIATION, OXFORD, MISSISSIPPI, ATTN: CLAIMS REPRESENTATIVE, 1700 G STREET, N.W., WASHINGTON, D.C. 20552. IF ADDITIONAL SPACE IS REQUIRED TO RESPOND COMPLETELY TO ANY ITEM, PLEASE ATTACH ANY ADDITIONAL STATEMENTS, SCHEDULES, APPENDICES, EXHIBITS, OR MATERIAL.

[For FSLIC Use Only]

Claim No. ——— Received: ———

Claims Representative: John Sears

(02/0023)

HOLCOMB, DUNBAR, CONNELL,
CHAFFIN & WILLARD

A PROFESSIONAL ASSOCIATION
Attorneys at Law
1217 Jackson Avenue
Post Office Drawer 707
Oxford, Mississippi 38655
601-234-8775

December 4, 1985

Mr. John Sears
Claims Representative
FSLIC
1700 G Street, N.W.
Washington, D.C. 20552

Re: Claim of Joseph M. Hudspeth

Dear Mr. Sears:

Enclosed please find the Affidavit of Lee Duddleston, to which I referred in our phone conversation on Monday, December 2, 1985. Please insert the Affidavit in the "Proof of Claim" notebook that I have previously forwarded to you, under the divider already designated as "Affidavit of Lee Duddleston."

As I discussed with you on Monday, because Mr. Duddleston expanded upon the content of his Affidavit after I had already submitted the Proof of Claim to you, an amendment to the "Consideration for Claim and Ground of Liability" is necessary. In particular, I have amended page 6 of that document to reflect the facts set forth in Mr. Duddleston's Affidavit. I am enclosing the amended page for your convenience in replacing the page 6 previously sent.

Also, as I told you on Monday, I do not believe it is mentioned anywhere in the "Proof of Claim" that

Charlie Sullivan, Chairman of the Board in 1977, died in a plane crash in 1979. Mr. Rogers' Affidavit mentions the death of Mr. Savoy in a plane crash later that year.

Also, this letter formally advises you, as we discussed on Monday, that Mr. Hudspeth desires a hearing on his claim before any final determination by you is made. Please let me know if you are willing to grant this request and, if so, when we might have the hearing.

Please let me know if you would like to have any further information or documentation concerning Mr. Hudspeth's claims.

Yours very truly,

/s/ Wylene W. Dunbar
WYLENE W. DUNBAR
WWD:stk
CC: Mr. Paul Grace
Mr. George Fair

Date of Notice: May 1, 1987

Claim No. 00-001-0001

NOTICE OF RECORD

The Federal Savings and Loan Insurance Corporation as Receiver for North Mississippi Savings & Loan Association ("Receiver"), hereby notifies you of the compilation of the administrative record with respect to your claim. Those documents, statements and other writings or materials that are to be made at part of the administrative record are detailed in the index attached hereto. The administrative record will be made available to you at a reasonable time and upon reasonable notice for inspection and copying at your expense at the following location:

Federal Home Loan Bank Board
1700 G Street, N.W.—4th floor, Claims
Washintgon, D.C. 20552

You are requested to provide, within 30 days of the date of this notice, any additional documents, statements, written information or other materials you feel should be included in the administrative record. After such time, the administrative record shall be considered complete.

IN THE EVENT OF AN ADVERSE DETERMINATION BY THE RECEIVER, THE ADMINISTRATIVE RECORD WILL BE THE SOLE BASIS FOR APPEAL AND REVIEW. THEREFORE, YOU SHOULD MAKE SURE THAT THE ADMINISTRATIVE RECORD CON-

TAINS EVERYTHING NECESSARY FOR THE DETERMINATION ON THE MERITS OF YOUR CLAIM.

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION, OXFORD, MISSISSIPPI

By /s/ John Sears
JOHN SEARS

(Attachment)

FEDERAL HOME LOAN BANK BOARD
1700 G Street, N.W.
Washintgon, D.C. 20552

Federal Home Loan Bank System
Federal Home Loan Mortgage Corporation
Federal Savings and Loan Insurance Corporation

July 6, 1987

Ms. Wylene W. Dunbar
Holcomb, Dunbar, Connell, Chaffin
& Willard
Attorneys at Law
1217 Jackson Avenue
Post Office Drawer 707
Oxford, Mississippi 38655

Dear Ms. Dunbar:

This is to acknowledge receipt of your letter with enclosures dated July 2, 1987 concerning the claim of Joseph M. Hudspeth. For any further information regarding this claim, please contact Doris Garrett of this office.

Sincerely,

/s/ John W. Sears
JOHN W. SEARS
OLD/FSLIC

cc: Doris Garrett

Date of Notice: 12/24/87

Claim No.: 00-001-0001

NOTICE OF PROPOSED DETERMINATION

The Federal Savings and Loan Insurance Corporation as Receiver for North Mississippi Savings & Loan Association ("Receiver") hereby notifies you that after review of your claim, including the administrative record, the Receiver proposed to reach the following determination:

☐ Allowance in full

☐ Partial Allowance/Disallowance

☒ Disallowance in full

Proposed findings of fact and conclusions of law are attached hereto, and, in the event you do not file a written request for reconsideration as described below, will constitute the Receiver's Initial Determination of your claim.

YOU HAVE 30 DAYS FROM THE DATE OF THIS NOTICE TO FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE RECEIVER. A request for reconsideration must state the specific grounds for any objections you may have to the proposed findings of fact or conclusions of law. You may also present alternate proposed findings of fact or conclusions of law. The Receiver will reply to any objections you may have to the proposed findings of fact and conclusions of law or any alternate proposed findings of fact or conclusions of law which have been timely filed, and issue its determination of your claim (the "Initial Determination") upon the completion of its review. In the event of an adverse determination by the Receiver, you will be given an opportunity to appeal the Receiver's Initial Determination within 60 days of the date of such notice of disallowance.

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION, OXFORD, MISSISSIPPI

By: /s/ John W. Sears
JOHN SEARS
Special Representative

JOSEPH M. HUDSPETH
Claim #: 00-001-0001

TO: FSLIC as Receiver for North Mississippi
Savings & Loan Association

ATTN: John W. Sears, Special Representative

Request for Reconsideration

Joseph M. Hudspeth hereby requests reconsideration of the Receiver's Proposed Determination regarding Claim No. 00-001-0001 filed by Mr. Hudspeth of December 24, 1987.

Mr. Hudspeth further objects to certain findings of fact and conclusions of law in said Determination as more specifically set forth in Exhibit "A" attached hereto and incorporated herein by reference.

Mr. Hudspeth further submits herewith his Proposed Alternative Determination, including alternative findings of fact and conclusions of law as set forth in Exhibit "B" attached hereto and incorporated herein by reference.

Respectfully submitted, this 3d day of March, 1988.

/s/ Joseph M. Hudspeth
JOSEPH M. HUDSPETH

/s/ Wylene W. Dunbar
WYLENE W. DUNBAR
Attorney for Mr. Hudspeth

Of Counsel:

Holcomb, Dunbar, Connell,
Chaffin & Willard
Post Office Drawer 707
Oxford, Mississippi 38655
(601) 234-8775

FEDERAL HOME LOAN BANK BOARD
1700 G Street, N.W.
Washington, D.C. 20552

Federal Home Loan Bank System
Federal Home Loan Mortgage Corporation
Federal Savings and Loan Insurance Corporation

March 7, 1988

Wylene W. Dunbar
Holcomb, Dunbar, Connell, Chaffin & Willard
1217 Jackson Avenue
Post Office Drawer 707
Oxford, Mississippi 38655

Dear Ms. Dunbar:

Your letter of March 3, 1988 submitting Mr. Hudspeth's Request for Reconsideration indicated that you do not have a copy of the FSLIC's guidelines for processing administrative claims. Enclosed please find a copy of the *Procedures for the Administrative and Determination of Claims Filed with the FSLIC As Receiver.* These procedures were signed by the Director, OFSLIC on August 29, 1986 and are expected to be incorporated into the Code of Federal Regulations shortly.

Sincerely,

/s/ John W. Sears
JOHN W. SEARS
Special Representative
FSLIC as Receiver for
North Mississippi Savings
and Loan Association

Enclosure

cc: George Fair

FILED
MAY 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER OF FIRSTSOUTH, F.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS IN SUPPORT OF PETITIONER

INTEREST OF UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS

This Brief is filed in support of Petitioner Coit Independence Joint Venture [1] and in the interest of the United States League of Savings Institutions ("U.S. League"), which arises from its being a membership institution whose members include federal- and state-chartered savings associations and savings banks ("savings institutions") with deposits insured by Respondent Federal Savings and Loan Insurance Corporation ("FSLIC") and which are subject to regulation by FSLIC and its operating head the Federal Home Loan Bank Board ("FHLBB").[2]

Resolution of the issues in this case and of the conflicts among the courts will have a substantial impact on the economic interests of U.S. League members, on their ability to attract and keep deposits, on their home mortgage and other lending and on their participation in secondary mortgage markets.[3] The soundness and stability of savings institutions depend to a significant extent on their ability to resell mortgages and other loans that they originate, either as whole loans or in the form of loan participations. The uncertainties now surrounding

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[1] Counsel for Petitioner and for Respondent have consented to the filing of this Brief. Their letters of consent are on file with the Clerk of the Court.

[2] Member savings institutions are located in every state, the District of Columbia, Puerto Rico, the Virgin Islands, Guam and the Pacific territories of the United States. These more than 3,200 members held approximately 96 percent of the $1.25 trillion of savings institutions' assets and of the $933 million of FSLIC-insured deposits available on December 31, 1987.

[3] Adverse effects on member savings institutions in turn impair the opportunities for families and individuals to obtain financing for their purchases of homes and other housing.

the obtaining of meaningful protection as a claimant in an FSLIC receivership, which have been created by Respondent's position that it possesses exclusive jurisdiction to determine the validity of all such claims, impair the ability of U.S. League members to resell loans and participations at full value. Questions of procedure, due process and delay in the administrative claims determination process, the virtual absence of statutory guidance and protections in connection with Respondent's self-proclaimed authority and constitutional concerns attending Respondent's position combine to impede fuller participation by U.S. League members in these secondary markets as buyers and as sellers.[4]

Thus, the U.S. League and its members are vitally interested in the outcome of this case not only because the receivership provisions of the Home Owners' Loan Act of 1933 and National Housing Act of 1934 are part of the regulatory framework in which they exist, but also because U.S. League members are claimants of FSLIC receiverships and because third parties with whom U.S. League members do business are concerned that their rights as potential claimants in FSLIC receiverships would not be adequately protected.

SUMMARY OF ARGUMENT

This case reviews an appeal affirming the dismissal by a United States district court for lack of subject matter jurisdiction of claims for usury, breach of fiduciary duty and breach of the implied duty of good faith and fair dealing in connection with loans made by FirstSouth, F.A., to petitioner. The decision relies on the authority of *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986), a case that has given rise to "the *Hudspeth* doctrine."

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[4] *See generally* Pfeiler, *FSLIC Adjudication of Claims Against Receiverships: Has the Search for Efficiency Lost Sight of Due Process?* 53 LEGAL BULL. 433, 448-57 (1987) (comparing treatment in sectors of secondary markets involving various types of financial institutions).

The *Hudspeth* doctrine—that no state or federal court may any longer determine the validity of claims against a savings institution for which FHLBB has appointed FSLIC receiver—is not supported by statutory authority or legislative history. The language, structure and legislative history of the relevant statutes indicate congressional intent that FSLIC enjoy the usual powers of a receiver to liquidate the estate, but do not indicate an intention to entrust FSLIC as receiver with unique power as the exclusive adjudicator of claims and disputes or to strip state and federal courts of traditional subject matter jurisdiction. To the contrary, the statutes devote detailed attention to the allocation of jurisdiction between state and federal courts (over the very matters on which FSLIC contends it was granted exclusive authority); to court access as a protection against administrative power; to administrative hearing requirements; and to provisions for judicial review of administrative determinations. Congress indicated no desire to strip state and federal courts of the subject matter jurisdiction to determine the validity of claims. *See, e.g., Morris v. Jones*, 329 U.S. 545 (1946); *Riehle v. Margolies*, 279 U.S. 218 (1929).

In connection with the liquidation of insured savings institutions, Congress provided FSLIC with traditional receivership authority to collect assets and to settle, compromise or release claims in favor of or against the insured institution. 12 U.S.C. § 1729(d) (1982). The statute did not suggest, and Congress did not intend, massive dislocation of judicial power to determine the validity of claims. The *Hudspeth* doctine, as it has been applied to a vast array of state and federal statutory and common law claims to require dismissal from court for lack of subject matter jurisdiction, is not authorized by federal law.

Congress provided a specific method for the prompt challenge before the United States courts of FHLBB's appointment of a receiver, 12 U.S.C. § 1464(d)(6)(A) (1982), and sought to protect the receiver from other

challenges to its authority or collateral actions that would substantially interfere with its conducting the receivership. *Id.* § 1464(d)(6)(C). The statute does not say, and its legislative history does not suggest, that Congress thereby intended to divest state and federal courts of subject matter jurisdiction to determine the validity of claims and resolve disputes within their competence.

Almost 20 years after the enactment of these provisions, FHLBB began to reinterpret them as if they allocated to FSLIC and FHLBB exclusive authority to determine all claims and disputes involving FSLIC receiverships. Since FSLIC is generally the largest creditor of the receivership, however, this scheme creates conflicts of interest. Respondent's financial interest in preserving and replenishing its insurance fund conflicts with its self-declared role as judge of the validity of the competing claims of other creditors. This constitutional due process concern is additional reason for the Court to construe the statutory authority strictly in accordance with its language and legislative history, to reject the *Hudspeth* doctrine and to reverse the decision of the Court of Appeals.

ARGUMENT

I. A Wide Variety Of Actions Is Being Affected By The Hudspeth Doctrine.

Respondent takes the position that the *Hudspeth* doctrine encompasses any and all types of claims made against an institution in FSLIC receivership.[5] In its most recently published "interim procedures," FSLIC defines "claim" broadly as "the assertion of a right to payment or other relief against an association or the receiver" and includes demands for recoupment, setoff, security and opposition to foreclosure by the receiver, as

[5] The FSLIC has even sought to apply the *Hudspeth* doctrine to claims for deposit insurance, but with mixed results. *Compare Jugum v. FSLIC*, 637 F. Supp. 1045, *reconsideration denied*, 646 F. Supp. 764 (W.D. Wash. 1986) *with Baskes v. FSLIC*, 649 F. Supp. 1358 (N.D. Ill. 1986).

well as wages, salaries and employment benefits. 53 Fed. Reg. 13,105, 13,106 (I.B.9.a. definition of "claim") (Apr. 21, 1988).

Since the *Hudspeth* decision three years ago, FSLIC has successfully invoked this preclusive doctrine to require state and federal courts to dismiss a staggering array of actions for lack of subject matter jurisdiction. Such matters range from simple to complex tort[6] and contract[7] claims commenced against the institution before the declaration of receivership. In addition, FSLIC has successfully urged the dismissal for lack of subject matter jurisdiction of claims alleging discrimination,[8] antitrust violation[9] and racketeering.[10] Respondent has taken the position, not always successfully, that claims of state and federal securities law violations cannot be heard by the courts.[11] Thus, express congressional grants of subject matter jurisdiction over federal claims are being overridden[12] and FSLIC and FHLBB are taking onto themselves responsibility for applying the entire body of state and federal statutory and common law.[13]

[6] *E.g., Union County Bank v. Knox Capital Corp.*, No. 657 (Tenn. Ct. App. Apr. 18, 1986); *Baer v. Abel*, 637 F. Supp. 347 (W.D. Wash. 1986).

[7] *E.g., Quackenbush v. Audubon Fed. Sav. & Loan Ass'n*, No. 86-2470 (E.D. La. Jan. 12, 1987); *Thomes v. Equitable Sav. & Loan Ass'n*, 831 F.2d 558 (5th Cir. 1987).

[8] *Resna Assoc. v. Fin. Equity Mortgage Corp.*, 673 F. Supp. 1371, 1372 (D.N.J. 1987).

[9] *Red Fox Indus., Inc. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987).

[10] *E.g., Lyons Sav. & Loan Ass'n v. Westside Bancorporation, Inc.*, 828 F.2d 387 (7th Cir. 1987); *Kohlbeck v. Kis*, 651 F. Supp. 1233 (D. Mont. 1987).

[11] *E.g., Lyons Sav. & Loan Ass'n v. Westside Bancorporation, Inc.*, 828 F.2d 387 (7th Cir. 1987); *Baer v. Abel*, 637 F. Supp. 347 (W.D. Wash. 1986). *But see FSLIC v. Provo Excelsior, Ltd.*, 664 F. Supp. 1405 (D. Utah. 1987).

[12] 15 U.S.C. §§ 4, 77v, 77aa (1982); 18 U.S.C. § 1964 (1982).

[13] *See In re Miller Dev. Corp.*, 71 Bankr. 460 (Bankr. M.D. La. 1987).

Further, security interests in liens are overridden,[14] and all assets, even those whose rightful ownership remains a matter of dispute, are subject to transfer.[15] In each case, all manner of right and interest are thereby reduced to those of a claim before FSLIC and FHLBB.[16]

The potential array of claimants includes owners of participation interests in loans originated by the institution in receivership or loans in which such institution is a participant,[17] borrowers,[18] creditors,[19] guarantors, lienholders[20] and, indeed, anyone seeking monetary damages or equitable relief from the institution or its re-

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[14] *E.g., Chupik Corp. v. FSLIC*, 790 F.2d 1269 (5th Cir. 1986); *Acquisition Corp. of Am. v. Sunrise Sav. & Loan Ass'n*, 659 F. Supp. 138 (S.D. Fla. 1987).

[15] *E.g., Keller v. Antioch Sav. & Loan Ass'n*, 143 Ill. App. 3d 278, 492 N.E.2d 937 (1986).

[16] In its 1985 proposed regulations, FHLBB provided assurance that certain types of participation interests in loans originated by the savings institution in FSLIC receivership were outside the liquidation process. 50 Fed. Reg. 48,970, 48,980-91, 48,995 (to be codified at 12 C.F.R. § 569c.10) (proposed Nov. 27, 1985). In its more recent "interim procedures," FHLBB concedes only that FSLIC "*may* recognize the holder of a participating interest in a loan in which the Receiver also holds a participating interest, or which the Receiver services, as one having an ownership interest and not a creditor of the insured institution in receivership." 53 Fed. Reg. 13,105, 13,106 (Apr. 21, 1988) (emphasis added). The matter is now left to the discretion of the receiver and FHLBB.

[17] *E.g., Peoples Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 677 F. Supp. 1104 (D. Kan. 1988); *Peninsula Fed. Sav. & Loan Ass'n v. FSLIC*, 663 F. Supp. 506 (S.D. Fla. 1987).

[18] *E.g., Red Fox Indus., Inc. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987); *FSLIC v. Kennedy*, 732 S.W.2d 1 (Tx. Ct. App. 1987).

[19] *E.g., Acquisition Corp. of Am. v. Sunrise Sav. & Loan Ass'n*, 659 F. Supp. 138 (S.D. Fla. 1987); *FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987).

[20] *E.g., Modern Supply Co. v. FSLIC*, 50 Wash. App. 194, 748 P.2d 251 (1988); *FirstSouth, F.A. v. LaSalle Nat'l Bank*, No. 86-10247 (N.D. Ill. Sept. 4, 1987).

ceiver.[21] 53 Fed. Reg. at 13,106-07 (I.B.10. definition of "claimant").

The procedural settings in which FSLIC seeks dismissals are unlimited. Whether complaint,[22] counterclaim,[23] crossclaim,[24] setoff[25] or recoupment, the claim is automatically a subject for an FSLIC motion to dismiss for lack of subject matter jurisdiction. Modern principles of judicial economy and evenhandedness are sacrificed as FSLIC is permitted to proceed in court for determination of liabilities and for enforcement and injunctive assistance while its party opponents are relegated to petitioning FSLIC and FHLBB for determinations of the validity of claims arising from the conduct and obligations of the failed institution.[26]

In *Grant v. Buckner*, 172 U.S. 232 (1898), this Court upheld a setoff against a receiver and rejected the contention that the federal receiver, appointed by a circuit court, should not be subject to a counterclaim in state court: "The receiver voluntarily went into the state court, and, having voluntarily gone there, cannot question the right of that court to determine the controversy between himself and the defendant." *Id.* at 238.[27] The principles

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[21] *E.g., E.g., Thomes v. Equitable Sav. & Loan Ass'n*, 831 F.2d 558 (5th Cir. 1987); *Bailey v. Metro Fed. Sav. & Loan Ass'n*, 642 F. Supp. 616 (W.D. La. July 28, 1986).

[22] *FSLIC v. Oldenberg*, 658 F. Supp. 609 (D. Utah. 1987).

[23] *E.g., FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987); *Baer v. Abel*, 649 F. Supp. 25 (W.D. Wash. 1986).

[24] *Politser v. Rosch*, No. 86-0076 (N.D. Ill. June 26, 1986).

[25] *FSLIC v. Ziegler*, No. 86-5297 (E.D. La. Jan. 20, 1988).

[26] As receiver, FSLIC has even argued that affirmative defenses not amounting to claims must be dismissed for lack of subject matter jurisdiction. *FSLIC v. Ziegler*, No. 86-5297 (E.D. La. Jan. 20, 1988).

[27] *See Alexander v. Hillman*, 296 U.S. 222, 241-42 (1935) (receivership court may entertain counterclaim against claimant); *cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (discussing benefits of allowing counterclaim practice).

of fairness, efficiency and comprehensiveness in the adjudication of disputes that support the result in *Buckner* are being ignored by application of the *Hudspeth* doctrine to counterclaims, setoffs and recoupments. Defendants are being put to the burden of multiple proceedings and the risk of inconsistent determinations.

In addition, claims whose validity has been determined by a state or federal court at the time of the receivership are being required to be determined anew as receivership claims by application of the *Hudspeth* doctrine.[28] Adverse court determinations are appealed, sometimes removed from state court to the federal system,[29] but always subject to FSLIC's contention that the action be dismissed for lack of subject matter jurisdiction. Court-approved settlements are abrogated with impunity [30] and jury verdicts may be ignored.[31]

The *Hudspeth* doctrine would curtail the jurisdiction of the federal courts and preempt that of the state courts to determine the validity of claims. Despite the lack of any special expertise on the part of FSLIC, FHLBB and their special representatives, decisionmaking authority is being dislocated to them from its traditional repositories. This result is the unavoidable consequence of the

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[28] *FSLIC v. Superior Court of San Joaquin County*, 180 Cal. App. 3d 336, 225 Cal. Rptr. 422 (1986), *cert. denied sub nom. American Sav. & Loan Ass'n v. FSLIC*, 107 S. Ct. 949 (1987); *Crockett v. FSLIC*, No. 86-195 (Tenn. Ct. App. 1986); *Union County Bank v. Knox Capital Corp.*, No. 657 (Tenn. Ct. App. 1986).

[29] *E.g., In re FSLIC*, 837 F.2d 432 (11th Cir. 1988); *Vernon Sav. & Loan Ass'n v. Commerce Sav. & Loan Ass'n*, 677 F. Supp. 495 (N.D. Tx. 1988).

[30] *FSLIC v. Bonfanti*, 826 F.2d 1391 (5th Cir. 1987), *petition for cert. filed sub nom. Zohdi v. FSLIC*, 56 U.S.L.W. 3196 (Aug. 5, 1987) (No. 87-255).

[31] *Homestead Sav. v. Life Sav. of Am.*, 668 F. Supp. 1121 (N.D. Ill. 1987) (district court's judgment refusing to vacate jury verdict reported in advance sheets as Slip Op. No. 86-20268 (July 1, 1987), withdrawn from bound volumes of reported decisions after settlement required decision to be vacated).

Hudspeth doctrine, which is stated in absolute terms of subject matter jurisdiction rather than in discretionary principles of exhaustion.

II. The Home Owners' Loan Act Of 1933 And National Housing Act Of 1934 Do Not Give FSLIC The Authority To Divest State And Federal Courts Of All Subject Matter Jurisdiction To Determine The Validity Of Claims Against Institutions In FSLIC Receivership.

A. *The Home Owners' Loan Act of 1933 and National Housing Act of 1934 as Amended Through 1954.*

Since 1933 FHLBB has had authority to appoint receivers for institutions it regulates and, since its establishment in 1934, FSLIC has had authority to act as receiver. In 1966, as will be discussed, Congress provided procedural safeguards in connection with the declaration of federal receiverships. Almost 20 years later, FSLIC began asserting that by these provisions Congress divested state and federal courts of all subject matter jurisdiction over claims against institutions for which FHLBB appoints FSLIC receiver. Since 1984, FSLIC has argued that sections 1464(d)(6)(C) and 1729(d) of title 12 of the *United States Code* strip the federal courts and preempt the state courts of their traditional judicial authority to determine the validity of claims. Read and understood in context and in light of their legislative history, these statutory sections do not support FSLIC's argument.

The statutory framework begins with the enactment of the Federal Home Loan Bank Act in 1932, which established the Federal Home Loan Bank Board and a system of regional home loan banks to provide an additional source of funds for local, state-chartered thrift institutions then engaged primarily in lending for home mortgages. Pub. L. No. 72-304, 47 Stat. 725 (1932).

As the economy worsened, Congress passed the Home Owners' Loan Act of 1933. Pub. L. No. 73-43, 48 Stat.

128 (1933). This statute empowered FHLBB to charter federal mutual thrift associations and, again, sought to provide additional sources of funds for mortgages. The Home Owners' Loan Act of 1933 provided that federally-chartered thrifts and state-chartered thrifts that converted to federal charter would be regulated by FHLBB. Included in the Act was authority for FHLBB "to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same." Pub. L. No. 73-43, § 5(d), 48 Stat. 128, 133 (1933).

Congress next enacted the National Housing Act of 1934, title IV of which established a system of deposit insurance and created the Federal Savings and Loan Insurance Corporation. Pub. L. No. 73-479, 48 Stat. 1246 (1934). From its inception, FSLIC had authority "[t]o sue and be sued, complain and defend, in any court of law or equity, State or Federal." Pub. L. No. 73-479, tit. IV, § 402(c)(4), 48 Stat. 1246, 1256 (1934).

The 1934 Act included a section on liquidation of insured institutions. Pub. L. No. 73-479, tit. IV, § 406, 48 Stat. 1246, 1259-60 (1934). Initially, in the event that a federally-chartered association was in default in the payment of insurance premiums, FSLIC was to be appointed conservator or receiver and was empowered to take over the assets of the association, to operate the association, to take action to put it in sound and solvent condition, to merge the association into another, to organize a new federal association to take over its assets or "to proceed to liquidate its assets in an orderly manner, whichever shall appear to be the best interests of the insured members of the association in default." *Id.* § 406(b), 48 Stat. 1246, 1260 (1934). With respect to state-chartered associations, FSLIC was authorized to act as conservator, receiver or other legal custodian if appointed by the court or other public authority having the power of appointment. *Id.* § 406(c), 48 Stat. 1246, 1260.

In either case, Congress provided:

> In connection with the liquidation of insured institutions in default, the Corporation shall have the power to carry on the business of and to collect all obligations to the insured institutions, *to settle, compromise, or release claims in favor of or against the insured institutions*, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

Id. § 406(d), 48 Stat. 1246, 1260 (1934) (codified at 12 U.S.C. § 1729(d) (1982)) (emphasis added).[32]

There is no indication in the reports, debates or hearings leading to the 1933 and 1934 Acts that Congress intended to devise any new allocation of power divesting the courts of their traditional jurisdiction to determine the validity of claims. The House Report on the National Housing Act of 1934 observes:

> Adequate provision is made for the liquidation of insured institutions somewhat similar to the plan for the liquidation of banks which are under Federal deposit insurance.

H.R. Rep. No. 1922, 73d Cong. 2d Sess. 4 (1934).[33]

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[32] In 1982, the last clause of this provision was amended to read: "subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority." Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, tit. I, § 122(g), 96 Stat. 1469, 1482 (1982). In 1987, this change was made permanent. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, tit. V, § 509(a), 101 Stat. 552, 635 (1987).

It is this section that the Fifth Circuit in *Hudspeth* erroneously stated was added to the statute in 1968. *Hudspeth*, 756 F.2d at 1101 n.2.

[33] In earlier hearings before the House Committee on Banking and Currency, the General Counsel of FHLBB had likewise testified that the insurance payment options of FSLIC as receiver were "substantially the same thing as in the Bank Deposit Insurance Corpo-

There is no hint, indication or expression in the legislative history that the authority of FSLIC to "settle, compromise, or release claims in favor of or against the insured institutions" was intended to include exclusive subject matter jurisdiction to adjudicate the validity of all claims.[34]

Further, in the Housing Act of 1954, Pub. L. No. 83-560, 68 Stat. 590 (1954), Congress amended the Home Owners' Loan Act's receivership provisions. Congress added an express provision empowering FHLBB "to sue or be sued, complain and defend in any court of competent jurisdiction in the United States." *Id.* § 503, 68 Stat. at 635. It added specific notice and administrative hearing requirements for exercise of FHLBB's "exclusive jurisdiction" to appoint a receiver, requiring that there

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ration legislation." Statement of Horace Russell, General Counsel, FHLBB, *Hearings on H.R. 9620 Before the House Committee on Banking and Currency*, 73d Cong., 2d Sess. 15, 18 (Comm. Print 1934).

During consideration in the House, Rep. Williams observed that the FSLIC plan generally "is analogous to the bank-deposit insurance provided at the last session." 78 Cong. Rec. 11,199-200 (1934).

The Comptroller of the Currency has not claimed exclusive subject matter jurisdiction to adjudicate claims against institutions in receivership under its "somewhat similar" authority. Indeed the Comptroller was then and is now to "make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been provided to his satisfaction *or adjudicated in a court of competent jurisdiction.*" 12 U.S.C. § 194 (1982) (emphasis added). *See United States ex rel. White v. Knox*, 111 U.S. 784 (1884); *Earle v. Pennsylvania*, 178 U.S. 449 (1900); *First Empire Bank v. FDIC*, 572 F.2d 1361, 1371 (9th Cir. 1978), *cert. denied*, 439 U.S. 919 (1978).

[34] *See Deep Rock Oil Corp. v. Salisbury*, 130 F.2d 387 (8th Cir. 1942); *Community Fed. Sav. & Loan Ass'n v. Fields*, 128 F.2d 705 (8th Cir. 1942); *Town of Texhoma ex rel. Versluis v. Nield*, 9 F.R.D. 739 (W.D. Okla. 1943). *See generally* Pfeiler, *FSLIC Adjudication of Claims Against Receivership: Has the Search for Efficiency Lost Sight of Due Process?* 53 LEGAL BULL. 433, 465-67 n.119 (1987); Barse, *A Summary of the Procedure and Principles Relating to the Liquidation of National Banks in Receivership*, Fed. B.A.J. I:3-10, 60 (1932).

be an opportunity for an administrative hearing in accordance with the Administrative Procedure Act and that there be judicial review, as therein provided, upon the weight of the evidence, *id.* 68 Stat. at 636.

B. *The Financial Institutions Supervisory Act of 1966.*

In 1966, Congress passed the Financial Institutions Supervisory Act and enacted the next significant amendments to the Home Owners' Loan Act of 1933 and National Housing Act of 1934. Pub. L. No. 89-695, 80 Stat. 1028 (1966). At the request of the Treasury Department, Federal Reserve Board, Federal Deposit Insurance Corporation and FHLBB, Congress provided intermediate remedial authority less drastic than seizure of the financial institution or termination of deposit insurance. The main thrust of the 1966 amendments was to authorize administrative cease-and-desist proceedings and removal and suspension of officers and directors.[35]

This legislation provided precise avenues for judicial review of all such administrative actions. The need for judicial review was a principal theme of the hearings, *see 1966 Senate Hearings* 15-16, 24-25; *1966 House Hearings* 31-32, 99, 107. Indeed, it is significant that in these 1966 amendments Congress devoted a high degree of care and attention to matters of procedure and court access.

In connection with the new cease-and-desist power granted FSLIC, an administrative hearing is required to be noticed, 12 U.S.C. § 1730(e)(1)(1982), and conducted in accordance with the Administrative Procedure Act,

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[35] *See Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 13 (1966) (statement of John E. Horne, Chairman, FHLBB) ["*1966 Senate Hearings*"]; *Financial Institutions Supervisory and Insurance Act of 1966: Hearings on S. 3158 & S. 3695 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 36 (1966) (statement of John E. Horne, Chairman, FHLBB) ["*1966 House Hearings*"].

id. § 1730(j)(1). Parties have the right to seek review by the United States Court of Appeals. *Id.* §§ 1464(f)(2), 1730(j)(2). A similar structure is expressly made applicable to removal or prohibition of an officer or director. *Id.* §§ 1464(d)(4)(E), 1464(d)(7), 1730(g)(5), 1730(j). With respect to FSLIC orders that require immediate effectiveness, see 12 U.S.C. §§ 1464(d)(3)(A), 1464(d)(4)(D), 1730(f)(1), 1730(g)(4), the affected party is accorded an additional immediate opportunity to apply to a United States district court for relief from such orders pending the completion of administrative proceedings. *Id.* §§ 1464(d)(3)(B), 1464(d)(4)(F), 1730(f)(2), 1730(g)(6).

Also in 1966, Congress added language to the enforcement section of the National Housing Act of 1934 that expressly allocates between federal and state courts jurisdiction over adjudication of various types of claims in the receivership of a state-chartered institution:

> *Provided*, That any action, suit, or proceeding to which the Corporation [FSLIC] is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.

Pub. L. No. 89-695, tit. I, § 101, 80 Stat. 1028, 1042 (1966) (codified at 12 U.S.C. § 1730(k)(1) (1982).[36] This language reserves for state court adjudication matters in which FSLIC is a party in its capacity as receiver for a state-chartered institution and that involve only the state law rights or obligations of investors, creditors, stockholders and the institution. *See* 112 Cong. Rec. 6,885, 6,892 (1966). This provision reflects congressional deference to state court authority in state law

[36] This language is an exception to the general rule that actions in which FSLIC is involved as a receiver arise under federal law and may be removed to federal court. *See* 12 U.S.C. § 1730(k)(1)(B), (C) (1982).

matters and, contrary to the *Hudspeth* doctrine, remains in full effect and force. *See FSLIC v. Ticktin*, 832 F.2d 1438 (7th Cir. 1987); *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1220-21 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Associates*, 56 U.S.L.W. 3249 (U.S. July 8, 1987) (No. 87-451).

Finally, it was in 1966 that the other statutory provision on which FSLIC and the *Hudspeth* decision rely was added as section 5(d)(6)(C) of the Home Owners' Loan Act of 1933. Pub. L. No. 86-695, tit. I, § 101(9), 80 Stat. 1028, 1033 (1966) (codified at 12 U.S.C. § 1464(d)(6)(C) (1982)). FSLIC tends to quote the language of the section in isolation, as follows:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

Id.

But this subpart of subsection 6 of paragraph (d) of section 5 is better understood when read in the context of preceding provisions, which show that the language quoted above is meant to avoid collateral attacks on the receivership through actions restraining the exercise of receivership powers and functions. *See 1966 Senate Hearing* at 319G (FHLBB section-by-section analysis); 112 Cong. Rec. 6,882, 6,891 (1966).

Specifically, subsection 6(A) sets forth the grounds for appointment of a receiver by FHLBB and the express authorization for the institution to bring an action within 30 days in United States district court to challenge the appointment.[37] Subpart 6(B) provides for

[37] Subpart 6(A) concludes by providing: "Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection to which the association is a party shall *stay* such action or proceeding during the pendency of the action for removal of the conservator or receiver." 80 Stat. at 1033 (emphasis added). In this sentence

special circumstances in which a receiver may be appointed without a hearing, such as consent of the institution. Subpart 6(D) outlines the powers of the conservator and provides that the only receiver that FHLBB may appoint for a federal institution is FSLIC.

Subpart 6(C) provides that the institution's authorized challenge within 30 days provided by subpart 6(A) is the exclusive avenue by which the appointment of the receiver may be challenged. The concluding language is meant to avoid unauthorized attacks on the receiver's appointment or collateral actions substantially interfering with the conduct of the receivership.[38]

Moreover, the legislative history of these 1966 amendments provides no indication of any congressional intent or FHLBB request that existing court jurisdiction to determine the validity of claims be removed and exclusive subject matter jurisdiction be vested in FSLIC. To the contrary, as explained above, Congress used great precision with respect to administrative proceedings, hearings, court jurisdiction, judicial review and standards of decision in a number of other places within the amendments, but not here. There is no expression, not a hint,

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Congress expressly considers a limited class of ongoing judicial proceedings—actions in U.S. district court to stay a temporary cease-and-desist order or a petition for review in a U.S. court of appeals of a cease-and-desist order issued after hearing—without expressly affecting court *jurisdiction* over other pending claims against the association. If Congress had intended to divest state and federal courts of jurisdiction generally, it would have done so. Further, the effect of the declaration of receivership is not to strip federal courts of jurisdiction over pending review of other regulatory action but merely to stay those proceedings. Mootness and judicial economy were congressional concerns, not the establishment of exclusive subject matter jurisdiction before the FHLBB. *See 1966 Senate Hearings* at 319G (FHLBB section-by-section analysis).

[38] Potential conflicts between state and federal authorities in the receivership setting have long been an issue of concern. *See, e.g., Pennsylvania v. Williams*, 294 U.S. 176 (1935). It may also arise between judicial and executive authorities. *See, e.g., In re Union Bank*, 176 A.D. 477, 163 N.Y.S. 485 (1917).

that subject matter jurisdiction of the courts was to be drastically reduced.[39]

This statutory setting in not one in which a regulatory agency has been delegated limited authority to effectuate specific congressional intent. Here FSLIC seeks to advance an extraordinary proposition on its own behalf and on behalf of FHLBB that is contrary to both the details and the structure of the governing statutes. Not only did Congress not evidence any intention of divesting from state and federal courts subject matter jurisdiction to determine claims, it provided expressly for state court jurisdiction over claims of investors, creditors and stockholders against the receiver of an insured state-chartered institution. 12 U.S.C. § 1730(k)(1) (1982).

C. *The Bank Protection Act of 1968.*

Finally, in the Bank Protection Act of 1968, Pub. L. No. 90-389, 82 Stat. 294 (1968), Congress amended the National Housing Act of 1934 to authorize FHLBB to appoint FSLIC receiver of insured state-chartered associations, but did not otherwise expand FSLIC's authority to dispose of claims in receivership. These provisions were a response to specific problems then being encountered in Illinois.

The FSLIC had paid out insurance on the deposits of an Illinois savings institution and had a claim to more than 96 percent of the assets of the institution, but FHLBB found the Illinois receiver who was appointed by state authority extremely uncooperative. The FHLBB

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[39] Subsection 6(C) is the complement to new subsection 8, which provided that with respect to the enforcement of orders, FHLBB could apply to a United States district court that would have "*jurisdiction* and power to order and require compliance" but that no other court "shall have *jurisdiction* to affect by injunction or order under this subsection, or to review, modify, suspend, terminate or set aside any such notice or order." 80 Stat. at 1034 (emphasis added). It is significant, in light of FSLIC's insistence that subsection 6(C) should curtail subject matter jurisdiction, that a companion section was written in jurisdictional terms but 6(C) was not.

represented to Congress that it was powerless to deal with such a situation. *See* S. Rep. No. 1263, 90th Cong., 2d. Sess. 9, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2538; *Savings and Loan Receiverships: Hearings on S.3436 Before the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 8, 10-11 (1968) [*"1968 Senate Hearings"*].

Nowhere in the hearings or debate on the Bank Protection Act of 1968 is there any indication that Congress or the FHLBB intended that these amendments strip courts of their traditional jurisdiction.[40] Nowhere is there any declaration that Congress intended to create an exclusively administrative procedure. Neither the language of these amendments nor their legislative history supports FSLIC's proffered construction.

However, the Senate report did discuss the significance of the provisions of section 1464(d)(6)(C) from the Home Owners' Loan Act of 1933. These provisions set forth the grounds for the appointment of a receiver for *federal* institutions and were incorporated by reference in the 1968 amendments to apply to FSLIC receiverships for *state* institutions. S. Rep. No. 1263, 90th Cong., 2d Sess. 9-10, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2538-39. The Senate report explained that the language in section 1464(d)(6)(C) forbids any collateral judicial attack on the appointment of the receiver:

> [S]*ection 5(d) also provides for prompt judicial review of the Board's appointment of the FSLIC as receiver. These provisions would also be extended to the appointment of the FSLIC as receiver for State associations.* Under section 5(d)(6)(A) insured associations are authorized to bring an action to remove the FSLIC as receiver within 30 days after its appointment . . . .

[40] In congressional testimony in 1968, FHLBB's Chairman acknowledged the distinction between the determination of the validity of claims and payment of valid claims. *1968 Senate Hearings* at 8 (statement of John E. Horne, Chairman, FHLBB).

> *The appointment of the FSLIC as receiver by the Board would not otherwise be subject to judicial attack.* Section 5(d)(6)(C) provides that *no court may take any other action toward the removal of a receiver, or, except at the instance of the Board, restrain or affect the exercise or powers or functions of a receiver.*

Id. at 10, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2439 (emphasis added).[41]

Neither in 1968 nor at any time thereafter did Congress amend the court jurisdiction language enacted in 1966, codified as 12 U.S.C. § 1730(k)(1) (1982), and quoted above. Congress continued to contemplate that when an insured state-chartered institution is involved in an action, suit or proceeding involving state law rights and obligations, it, and FSLIC as its receiver, will be subject to state court jurisdiction. With all the intricate and thorough amendments to these sections of the Naitonal Housing Act since 1966, Congress' declaration that

[41] The Senate Report also observed:

> The authority of the FSLIC in this regard would be subject only to the *regulation* of the Federal Home Loan Bank Board and *not* to that *of any State authority*, administrative or judicial, *which may previously have had regulatory authority* with respect to the institution.

S. Rep. No. 1293 at 10, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2539 (emphasis added). *See 1968 Senate Hearings* at 7 (statement of John E. Horne, Chairman, FHLBB).

This language was misinterpreted by the United States Court of Appeals for the Fifth Circuit in *Hudspeth*. The court ignored the material highlighted above that reveals congressional concern and interest. The Senate was seeking to remove any potential for conflict between FSLIC, as receiver appointed by FHLBB, and the state savings and loan commission or any court-appointed conservator, receiver or other legal custodian, *viz.*, any state entity that had been exercising *regulatory* authority. The Fifth Circuit transformed the Senate Report's expression of concern from one regarding state "regulatory authority" to one regarding "other judicial *or* regulatory authorities." *Hudspeth*, 756 F.2d at 1101 (emphasis added).

it was *not* seeking to preempt state court authority remains undisturbed.

D. *Judicial Competence to Determine the Validity of Claims.*

The statutes are replete with references to FSLIC being subject to suit. In only one subsection did Congress specifically express the intent to deprive courts of "jurisdiction" to entertain collateral attacks. 12 U.S.C. § 1464 (d)(8) (1982). And Congress gave precise attention to matters of procedural fairness, administrative hearings and avenues for judicial challenge or judicial review of agency action. In this setting, it is unthinkable that Congress would curtail the subject matter jurisdiction of state and federal courts to determine the validity of claims without doing so expressly and discussing such a change in legislative history.

The powers of a receiver under section 1729(d) of the National Housing Act of 1934 have not changed since its enactment. The authority that section confers is only to carry out the traditional function of a receiver, "to settle, compromise, or release claims," not to "adjudicate" or "determine" disputes on the merits by application of law to facts. *See Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Associates*, 56 U.S.L.W. 3249 (U.S. July 8, 1987) (No. 87-451); *FSLIC v. Glen Ridge I Condominiums, Ltd.*, 31 Tex. Sup. Ct. J. 294 (Mar. 30, 1988). Further, this section confers authority on FSLIC as receiver, not FHLBB as adjudicator.[42]

Unlike in the other sections of the National Housing Act of 1934 and its 1954, 1966 and 1968 amendments, in section 1729(d) Congress does not provide a method for judicial review of FSLIC or FHLBB actions taken

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[42] Under its recently published "interim procedures" it is FHLBB, not FSLIC, that finally determines claims. 53 Fed. Reg. 13,105 (Apr. 21, 1988).

in connection with the settlement, compromise or release of claims. When Congress intended to authorize FSLIC or FHLBB to take administrative action with Administrative Procedure Act review by the United States district courts in other sections of the National Housing Act, it did so expressly. 12 U.S.C. §§ 1464(d)(7)(A); 1730(j)(2) (1982). The lack of any judicial provision in connection with section 1729(d)'s authorization for the receiver to settle, compromise or release claims confirms that Congress did not intend this language to establish an exclusively administrative claims determination procedure.

Finally, Congress provided the same authority to FSLIC as receiver with respect to claims in favor of as well as claims against the insured institution. It neither intended nor made any fundamental distinction in the jurisdictional and procedural aspects for pursuing both types of matters. Specifically, even FSLIC has not construed section 1729(d) as self-executing authority to declare itself entitled to recovery on disputed claims without first establishing such a claim to the satisfaction of a court. *Cf.* 12 U.S.C. § 1464(d)(8) (1982) (FSLIC authorized to commerce actions to enforce orders and notices). Just as Congress intended FSLIC to be able to settle, compromise and release its claims as receiver without dislocating vast subject matter jurisdiction from the courts, it intended FSLIC to be able to negotiate settlement of claims brought against the savings institution. The subject matter jurisdiction of the courts remains unaffected.

Similarly, section 1464(d)(6)(C) of the Home Owners' Loan Act of 1933 is a prohibition of collateral attacks on FSLIC in its role as a traditional receiver. It is in the nature of an anti-injunctive provision to forestall successive challenges to the appointment of the receiver and to prevent harrassment of the federally-appointed receiver as FSLIC performs its general receivership functions. *See, e.g., Womble v. Dixon*, 585 F. Supp. 728 (E.D. Va. 1983); *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 547 F. Supp. 988 (D. Haw. 1982); *see gen-*

erally Fidelity Fin. Corp. v. FSLIC, 834 F.2d 741 (9th Cir. 1987) (*dictum*). In the context of its legislative history it cannot be read as more.

Courts traditionally have determined the validity of disputed claims without restraining or affecting a receivership.

> As pointed out in *Riehle v. Margolies*, 279 U.S. 218, 224, the distribution of assets of a debtor among creditors ordinarily has a "two-fold aspect." It deals "directly with the property" when it fixes the time and manner of distribution. No one can obtain part of the assets or enforce a right to specific property in the possession of the liquidation court except upon application to it. *But proof and allowance of claims are matters distinct from distribution. They do not "deal directly with any of the property."* "The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*." *Id.*, p. 224. *The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court*, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have. And see *Chicago Title & T. Co. v. Fox Theatres Corp.*, 69 F.2d 60.

Morris v. Jones, 329 U.S. 545, 548-49 (1946) (emphasis added). *Accord Riehle v. Margolies*, 279 U.S. 218, 223-24 (1929); *Grant v. Buckner*, 172 U.S. 232 (1898); *First Nat'l Bank of Bethel v. Nat'l Pahquioque Bank*, 81 U.S. (14 Wall.) 383 (1872).[43]

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[43] *Schulenberg v. Norton*, 49 F.2d 578 (8th Cir. 1931):

> The statute provides an easy, speedy manner of determination of claims by permitting such to be presented to a receiver appointed by the Comptroller, *but this is quite different from limiting the ordinary and usual way of determining rights of creditors judicially.*

Id. at 580 (emphasis added). *Cf. Tcherepnin v. Knight*, 389 U.S. 332, 346 (1967) (clear distinction between determination of validity of claims on the one hand and priority of claims on the other).

Moreover, since FSLIC is relying on section 1464(d)(6)(C), it has the remaining problem that the section does not contemplate any judicial review. That section is different from others in the Home Owners' Loan Act of 1933 that provide for agency action and expressly provide for review of such action by a court pursuant to the Administrative Procedure Act. Indeed, section 1464(d)(6)(C) expressly forbids court attention. Accepting FSLIC's interpretation of this section would mean that Congress intended to delegate to the discretion of FSLIC as receiver authority to determine claims that is completely unreviewable, *see* 5 U.S.C. § 701(a)(1) (1982), or, at best, reviewable only under the catchall provisions of section 704 of the Administrative Procedure Act as final agency action "for which there is no other adequate remedy in a court." *Id.* § 704.

In this connection, FHLBB's statements, testimony, explanations and discussions that form part of the legislative history of the Home Owners' Loan Act of 1933, National Housing Act of 1934 and their amendments in 1954, 1966 or 1968 did not explain to Congress that FHLBB or FSLIC was seeking authorization to constitute it or them the exclusive adjudicators of all claims in dispute in FSLIC receiverships.

E. *Prior FHLBB and FSLIC Interpretations.*

The FHLBB and FSLIC conceived their current construction only recently. The argument that FSLIC has been proclaiming since 1984 on behalf of itself and FHLBB does not appear in earlier FSLIC receivership cases.[44]

A review of FHLBB and FSLIC regulations confirms the lack of historical support for FSLIC's new-found posi-

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[44] *Deep Rock Oil Corp. v. Salisbury*, 130 F.2d 387 (8th Cir. 1942); *Community Fed. Sav. & Loan Ass'n v. Fields*, 128 F.2d 705 (8th Cir. 1942); *Town of Texhoma ex rel. Versluis v. Neild*, 9 F.R.D. 739 (W.D. Okla. 1943); *see W-V Enterprises, Inc. v. FSLIC*, 234 Kan. 354, 673 P.2d 1112 (1983); *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 547 F. Supp. 988 (D. Haw. 1982).

tion. By 1937, FHLBB had promulgated regulations governing receiverships. The receiver was required to conduct a hearing at the home office of the association at which time any interested person could propose any plan for the disposition of the association's assets. The receiver was to recommend a plan to the FHLBB and, with its approval, proceed to liquidate the association, 24 C.F.R. §§ 204.4-.5 (1938). By 1941, FHLBB had detailed the duties of a receiver. 6 Fed. Reg. 4,413, 4,414-15 (1941) (to be codified at 24 C.F.R. § 204.10(c), (f), (m)). The regulation [45] included provisions for the allowance of claims "proved to the satisfaction of the receiver," *id.* at 4,415 (to be codified at 24 C.F.R. § 204.11 (b)), in language reminiscent of national bank receivership provisions. 12 U.S.C. §§ 193-94 (1982).

After enactment of the Financial Institutions Supervisory Act of 1966, *no* revisions or amendments to these regulations were promptly proposed or promulgated to set forth procedures for exercise of the purportedly exclusive jurisdiction now being claimed.[46] Following enactment of the Bank Protection Act of 1968, FHLBB promulgated new regulations to implement the amendments allowing FHLBB to appoint FSLIC receiver for state-chartered institutions. There is nothing in these regulations indicating that the determination of the validity of claims against an institution in FSLIC receivership is removed from the jurisdiction of the courts. On the contrary, the references to defending legal actions "by and against the Receiver or such institution," 33 Fed. Reg. 14,367 (1968) (to be codified at 12 C.F.R. § 569a.6(a)(3)), indicate the opposite.[47]

[45] After a series of redesignations, these provisions were repromulgated as part 149 of title 24 of the *Code of Federal Regulations* and then as part 549 of title 12, where they remain. *See* 8 Fed. Reg. 1,180 (1943); 13 Fed. Reg. 8,273 (1948); 14 Fed. Reg. 3,980 (1949); 21 Fed. Reg. 4,546, 4,548 (1956); 23 Fed. Reg. 9,877 (1958); 44 Fed. Reg. 39.108, 39,142 (1979).

[46] However, in 1967 FHLBB did promulgate a detailed set of rules of practice and procedure for adjudicatory proceedings. 12 C.F.R. §§ 509.1-.22 (1987). These rules are expressly made applicable to proceedings required for exercise of the other new authority. Conspicuous by its absence is any reference to receivership claims adjudication. See 12 C.F.R. § 509.1 (1987).

Not until November 27, 1985, six months after the Fifth Circuit's reconsidered opinion in *Hudspeth*, which accepted FSLIC's theory, did FHLBB propose extensive revisions to its receivership regulations. 50 Fed. Reg. 48,970 (1985).[48] These "significant" proposals cover a number of substantive law topics, including the effect of receiverships on agreements and the priority of claims, and embrace the *Hudspeth* doctrine. 50 Fed. Reg. at 48,978. These proposed regulations have yet to be promulgated in final form almost two and one-half years after being proposed. Instead, on April 21, 1988, FHLBB published "interim procedures," which it avers have been in effect since July 1, 1986. 53 Fed. Reg. 13,105 (Apr. 21, 1988).[49]

The *Hudspeth* doctrine is a new development. It was not the basis for past administrative construction of these

[47] The 1968 regulations make no provision for judicial review. *Cf.* 12 U.S.C. § 1730(j) (1982) (judicial review provisions for proceedings).

[48] *See also* 1 FEDERAL GUIDE (U.S. League of Savings Institutions) ¶ 11,776, at 3738-39 (1987) (FHLBB, General Counsel Opinion, Mar. 23, 1984) (commenting on what a court would likely hold with respect to possible challenges that FSLIC as receiver might make to provisions of secured transactions contracts entered into by association prior to appointment of receiver); 49 Fed. Reg. 45,065, 45,066 (Nov. 14, 1984) (possible litigation in connection with repurchase agreement).

[49] Without amending its current regulations, see 12 C.F.R. pts. 549, 569a (1987), FHLBB has now published a new set of "interim procedures" declaring FHLBB's decision on claims to be final agency action. 53 Fed. Reg. at 13,110-11. In a purported administrative structure in which appeals must be taken from FSLIC to FHLBB, regulated institutions with a claim against an FSLIC receivership could be intimidated in deciding whether to pursue rights of appeal.

statutes and is not consistent with them. Respondent should not be permitted to "bootstrap" itself into a position of exclusive jurisdiction when it cannot "demonstrate the sort of longstanding, clearly articulated interpretation of the statute which would be entitled to great judicial deference, particularly in light of the clear indications that Congress did not intend to invest the [Respondent] with the authority it is now seeking to assert." *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973); *see Federal Reserve Bd. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986); *FAIC Securities, Inc. v. United States*, 768 F.2d 352 (D.C. Cir. 1985).

III. The Respondent's Interpretation of the Statutes Raises Significant Constitutional Concerns.

Fundamental fairness requires an impartial and disinterested determination of the validity of claims. Parties have a right to a "neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). *See Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1928).

As receiver FSLIC is not a disinterested factfinder, but has a conflicting financial interest in the outcome of virtually all claims. Every dollar paid out to claimants is a dollar less with which to reimburse FSLIC for payments made as insurer of savings accounts or to repay FSLIC for loans or other monetary assistance to the FSLIC receivership.

Indeed, in seeking to persuade Congress in 1968 to grant it authority to appoint FSLIC receiver for state-chartered institutions, FHLBB argued that FSLIC should be the receiver because, as the institution's principal creditor, it would have great incentive to collect the assets of the institution. John E. Horne, then Chairman of the FHLBB, testified:

> It is clear that *the Corporation, given its huge financial interest in every case, is the most highly motivated party* available to do the job in an orderly and economical way.

1968 Senate Hearings at 10-11 (testimony of John E. Horne, Chairman, FHLBB) (emphasis added). *Accord* S. Rep. No. 1263, 90th Cong., 2d Sess. 7 (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2536; 114 Cong. Rec. 5,339 (1968) (statement of Rep. Patman); *1968 Senate Hearings* at 14, 16 (testimony of John E. Horne, Chairman, FHLBB).

It is just such a "huge financial interest," qualifying FSLIC as a "highly motivated" collector of debts and assets, that must disqualify it from serving as judge and jury for claims being made against the institution in receivership. The statute itself identifies the conflict by directing FSLIC as receiver to act "in the best interest of the association, its savers, *and the Corporation.*" 12 U.S.C. § 1729(b)(1)(A) (1982) (emphasis added). In this setting, with its interest in preserving and replenishing the insurance fund, FSLIC cannot impartially determine the claims of other creditors.[50]

This due process concern, U.S. Const. amend. V, is additional reason to reject FSLIC's proffered construction of the statute as allocating exclusive subject matter jurisdiction to FSLIC and FHLBB. *See Morrison-Knudsen Co.*, 811 F.2d at 1222; *FSLIC v. Glen Ridge I Condominiums, Ltd.*, 31 Tex. S. Ct. J. 294, 296 (1988). The U.S. League submits that these constitutional concerns may be avoided by adhering to an interpretation of the statute that is consistent with its language and legislative history. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 54 U.S.L.W. 5096, 5098-99 (U.S.

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[50] Should FSLIC advert to strains on the insurance fund and general characterizations of the state of the savings and loan industry, the U.S. League respectfully suggests that such matters are not of record in this proceeding. These are not matters of which a court should be asked to take judicial notice. They are subjects better considered by Congress as matters of public and legislative policy. Finally, such arguments are out of place when used to rationalize infringements upon constitutional rights.

July 7, 1986); *Lowe v. SEC*, 472 U.S. 181 (1985); *Crowell v. Benson*, 285 U.S. 22, 46 (1932).

CONCLUSION

Based on the arguments set forth above, the United States League of Savings Institutions respectfully requests that the Court reverse.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, As Receiver of FirstSouth, F.A.,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF AMICUS CURIAE OF GEORGE S. WATSON, A. STARKE TAYLOR, III AND WATSON & TAYLOR REALTY COMPANY IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI

Amicus Watson & Taylor Realty Company ("W&T Realty") is a corporation that manages real estate development projects. Amici George S. Watson and A. Starke Taylor, III are the sole shareholders of W&T Realty and its principal officers. These amici have obtained the written consent of both parties to this case to file a brief in support of petitioner.

Like petitioner Coit Independence Joint Venture ("Coit"), the amici have unadjudicated claims for damages and equitable relief against FirstSouth, F.A. ("FirstSouth"), an insolvent savings and loan association. The decision of the Fifth Circuit in issue in this case vitally impacts amici's interest in the fair and efficient adjudication of its claims by holding, under authority of *North Mississippi Savings and Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986), that all claims asserted against a failed thrift for which FSLIC has been appointed the receiver must be adjudicated exclusively in summary administrative proceedings which bear little resemblance to the judicial process afforded by state and federal courts. Amici have filed this brief in support of petitioner because the ongoing controversy among amici, FirstSouth, and FSLIC as receiver of FirstSouth, starkly illustrates the impropriety of FSLIC's interpretation of its statutory powers.

Over a period of years, amici and FirstSouth engaged in a variety of commercial transactions. In exchange for fees, interest, and a 50% profit participation, FirstSouth agreed to provide funds necessary to acquire and develop many real estate projects managed by W&T Realty. FirstSouth later defaulted on its obligation to fund these projects, the loans became delinquent, and, after FirstSouth was declared insolvent, FSLIC foreclosed on the underlying real estate. Messrs. Taylor and Watson also each purchased approximately 10% of FirstSouth's outstanding shares. When FirstSouth was declared insolvent, each lost an investment of $4.2 million.

These loan and stock transactions have given rise to claims for damages and equitable relief both by amici and by FSLIC as receiver of FirstSouth. FSLIC initiated an action against amici in the Federal Court for the Eastern District of Arkansas, claiming that W&T Realty is obligated by loan guarantees to pay $93 million into the receivership for alleged deficiencies remaining on the loans after foreclosure of the properties. *FSLIC v. Watson, et al.*, E.D. Ark. No. LRC 87-806 (filed November 10, 1987). FSLIC also alleged that Messrs. Taylor and Watson were liable for unpaid amounts on FirstSouth's loans to W&T Realty-managed projects, and additionally contended that they were liable under RICO for treble damages totaling over $200 million.[1] Amici, on the other hand, contend that precisely the same loan and stock transactions also give rise to their claims against FirstSouth for fraudulently inducing the loan guarantees and the stock purchases, which have resulted in millions of dollars in damages compensable under RICO, the Securities Exchange Act of 1934, as well as under state common law causes of action. FSLIC's position, consistent with its practice in prior cases, *see FSLIC v. Provo Excelsior Ltd.*, 664 F. Supp. 1405 (D. Utah 1987); *FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987), is that amici's counterclaims cannot be asserted in the federal court action brought by FSLIC, but must proceed independently through the FSLIC administrative process under *Hudspeth*,

[1] By order of April 29, 1988, the District Court dismissed FSLIC's complaint for lack of venue, indicating that the action must be maintained in Texas. This decision by no means moots the interest of amici, however, since FSLIC can be expected to ultimately pursue its claims in a District Court where venue is proper.

despite the fact that the claims all arise out of a common nucleus of facts.

SUMMARY OF ARGUMENT

In this case, FSLIC seeks to totally divest all state and federal courts from original jurisdiction over any cause of action asserted by a claimant against a savings and loan institution of which FSLIC is the receiver. The Bank Board and FSLIC have purported to replace the judicial power of state and federal courts with an administrative procedure before a "special representative" appointed by FSLIC which affords almost no right to discovery, no right to compel testimony, no right to cross-examination, and minimal judicial review. Conservators and Receivers; Interim Procedures, 53 Fed. Reg. 13,105 (1988) (to be codified at 12 C.F.R. Parts 547-49, 563, 569a-c) (hereinafter "interim procedures"). FSLIC has maintained that this radical departure from the judicial process is warranted because the questions reserved to administrative process are ones "within the agency's specialization or expertise" and the "administrative claims process is fully capable of granting complete relief". Brief for FSLIC on petition for writ of certiorari at 20, *Zohdi v. FSLIC*, 87-255.

As the circumstances of the controversy with amici and numerous other similarly situated claimants demonstrate, however, FSLIC's interpretation of its statutory powers in fact conflicts with congressional directives and cannot be justified by reference to assertions of efficiency or expertise. First, FSLIC has sought to establish exclusive jurisdiction over all claims against an institution in receivership including many claims, such as claims arising under the anti-

trust and securities laws, which are expressly reserved to the exclusive jurisdiction of the federal district courts. Such claims are totally outside the "agency's specialization" and cannot possibly be adequately adjudicated under FSLIC's truncated procedures. Second, FSLIC's interpretation of its statutory powers would preclude the resolution of an entire controversy in a single unbiased forum. In the many instances in which the receiver seeks to pursue affirmative claims against a creditor, which must be brought in state or federal courts, FSLIC's reservation of jurisdiction over claims against the receivership has and will continue to create piecemeal adjudication of claims with the agency's General Counsel acting as counsel in one of the proceedings and as the decisionmaker in the other. These problems, inherent in FSLIC's procedure, provide additional support for the Ninth Circuit's conclusion in *Morrison-Knudsen Co. v. CHG Int'l., Inc.*, 811 F.2d 1209 (9th Cir. 1987), petition for cert pending *sub nom. FSLIC v. Stevenson Assoc.*, No. 87-451, that Congress never intended to delegate the judicial powers claimed by FSLIC in the case before this Court.

ARGUMENT

I. FSLIC'S INTERPRETATION OF ITS STATUTORY POWERS CONFLICTS WITH OTHER FEDERAL STATUTES VESTING EXCLUSIVE JURISDICTION OVER CLAIMS IN FEDERAL DISTRICT COURTS

FSLIC has interpreted its statutory powers to include the power to divest federal district courts from asserting original jurisdiction over any claim against a failed savings and loan in federal receivership, including claims arising under RICO, the antitrust laws,

and the federal statutes governing securities fraud. *See* Interim Procedures ¶ I.B.9, 53 Fed. Reg. at 13,109 (defining "claims" within the exclusive jurisdiction of the FSLIC administrative proceeding to include the assertion of any "right to payment or other relief against an association or the Receiver"); *Red Fox Industries, Inc. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987) (applying *Hudspeth* to preclude federal court jurisdiction over Sherman Act claim against failed institution for illegal tying arrangement); *Lyons S&L Assoc. v. Westside Bancorporation, Inc.*, 828 F.2d 387 (7th Cir. 1987) (acquiescing in the application of *Hudspeth* to claims under RICO and the Securities Exchange Act). This assertion of regulatory authority lacks *any* direct congressional authorization, and is squarely in conflict with the congressional mandate that all claims arising under RICO, the antitrust laws, and the securities laws be vested in the exclusive jurisdiction of the "district courts of the United States". *See* 15 U.S.C. § 78aa (securities law jurisdiction); 15 U.S.C. § 15 (antitrust jurisdiction); 18 U.S.C. § 1964 (RICO jurisdiction).

The jurisdiction asserted by FSLIC over such claims not only contravenes the express language of these statutes, but is also wholly inadequate to fulfill their remedial purposes. Congress determined that it would not entrust the adjudication of these claims even to the agencies with primary authority for enforcing these statutes. It certainly cannot be inferred that Congress nevertheless intended to permit FSLIC's "special representatives" with no expertise in these areas to resolve the complex legal and factual issues which arise in the course of adjudicating such claims.

Moreover, even if the special representatives' expertise were adequate to resolve such claims, the procedures under which the special representatives must adjudicate those claims are not. This Court has recognized that summary disposition of complex statutory claims without a full opportunity for discovery and factual development cannot fulfill the remedial purposes of such statutes. *See e.g., Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962) ("We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles. . . . It is only when the witnesses are present and subject to cross-examination that their credibility . . . can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'.") *Cf. Sedima, S.P.R.L. v. Imprex Co.*, 469 U.S. 1157 (1985) (rejecting a narrow reading of RICO which permitted summary disposition of most claims in view of the broad remedial purposes of the Act).

The administrative procedures adopted by the Bank Board, however, permit nothing other than summary disposition based upon inadequate discovery. The procedures do not permit any depositions, even of officers and employees of the failed savings and loan institution. They do not provide a right to compel any discovery of any type from a third party, even though such discovery is commonly critical to the assertion of these claims. They do not permit the claimant to compel the testimony of any witness at a hearing on the record. They do not even permit the claimant to cross-examine witnesses who provide statements relied upon by the receiver. Claimants are limited to proof which can be obtained voluntarily or from the

documents of the institution in receivership. FSLIC's claim that it can adequately adjudicate multimillion dollar controversies under the antitrust, securities and RICO laws in this fashion is ludicrous. These wholly inadequate procedures fall so far short of providing even rudimentary due process that Congress could not have intended to permit FSLIC to substitute such proceedings for the judicial processes afforded by federal district courts.

II. FSLIC'S INTERPRETATION OF ITS STATUTORY POWERS WOULD PRECLUDE THE RESOLUTION OF AN ENTIRE CONTROVERSY IN A SINGLE IMPARTIAL FORUM

This Court has repeatedly recognized a strong federal policy in favor of adjudicating an entire controversy in a single forum. *See* Federal Rule of Civil Procedure 13(a) (requiring the assertion of any counterclaim arising out of the "transaction or occurrence that is the subject matter of the opposing party's claim"); *Alexander v. Hillman*, 296 U.S. 222, 241-43 (1935) (finding that jurisdiction of district courts in receivership actions includes the power to determine counterclaims so as to permit "complete relief"); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986) (finding that Congress would not have intended to bifurcate claims between commodities brokers and their customers because such bifurcation would preclude efficient remedies). FSLIC has nevertheless interpreted its statutory powers to permit it to require the bifurcation of controversies.

FSLIC's own claims against alleged debtors to the association must be brought in state or federal courts. The interim procedures, however, require a debtor's claims to be pursued in the administrative forum, and

FSLIC accordingly seeks to dismiss counterclaims asserted in actions that FSLIC itself has brought. *See e.g., FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987) (dismissing counterclaims under *Hudspeth*.) Thus, in the very common class of cases where the receiver and an alleged debtor have claims against each other, FSLIC's administrative procedure serves to create simultaneous proceedings in two forums, concerning two sides of the same controversy, with the potential for conflicting results. FSLIC has thereby created inefficiencies far greater than those inherent in the judicial process it has sought to displace.

Moreover, the bifurcated remedy afforded is not only inefficient, it is inequitable. Bifurcating proceedings would effectively deprive a debtor of the right to set off certain amounts owed to him against his liability to the savings and loan. Almost a century ago, this Court rejected any interpretation of the banking laws which would impliedly destroy a debtor's equitable right of set-off. *Scott v. Armstrong*, 146 U.S. 499 (1892). *See also, FDIC v. Mademoiselle of California*, 379 F.2d 660 (9th Cir. 1967) (recognizing a right of set-off where FDIC was acting as the receiver of a failed banking institution). And a half century ago, this Court in *Alexander v. Hillman, supra*, specifically recognized that principles of equity required both claims against and counterclaims by a corporation's receiver to be adjudicated in the same action so that a single tribunal could grant "complete relief". FSLIC is accordingly in error when it asserts that "there can be no dispute that the administrative claims process is fully capable of granting complete

relief". FSLIC's petition for certiorari in *Zohdi v. FSLIC*, 87-255 at 20.

Finally, the petitioner's due process claim that the administrative tribunal is impermissibly biased, is blatantly illustrated by the facts of the controversy between amici and FSLIC. The name of FSLIC's General Counsel, Jordan Luke, appears on the complaint as attorney for the receiver of FirstSouth in its claims against amici in federal court. At the same time, Mr. Luke as General Counsel of the Bank Board, is given responsibility to participate in the determination of the merits of amici's claims against FirstSouth in the administrative proceeding.[2] But the claims by and against amici arise out of the same facts, placing the General Counsel in the untenable position of attempting to judge amici's claims impartially in the administrative process, while he simultaneously is contesting amici's version of these same underlying facts in the federal court proceedings.

FSLIC has accordingly created a procedure which effectively permits the lawyer for one of the parties

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[2] *See* Pfeiler, FSLIC Adjudication of Claims Against Receiverships: Has the Search for Efficiency Lost Sight of Due Process?, United States League of Savings Institutions Legal Bulletin 433, 502 (September 1987) (publishing FSLIC administrative procedures which state that the Board has "delegated to the Director, Office of the Federal Savings and Loan Insurance Corporation (OFSLIC), final decisionmaking authority, *with the concurrence of the General Counsel*, for the resolution of administrative appeals. . . .") (emphasis added.) Although the interim procedures do not expressly include the text of this provision, they purport to be the same as prior procedures. Interim Procedures, 53 Fed. Reg. 13,105, 13,111.

to also serve as the judge presiding over the case. These procedures must founder on this Court's admonition that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). The wholly inconsistent roles given to the General Counsel as an individual vividly illustrate the fundamental flaw in FSLIC's effort to perform the conflicting roles of receiver and receivership court. FSLIC, as receiver, is driven by the need to protect FSLIC's severely strained insurance fund, and neither FSLIC, nor the Bank Board as FSLIC's operating head, can be expected to ignore that overriding bias when deciding substantial claims against receivership assets which, if recognized, would increase the insurance fund's outlays. FSLIC's assertion of authority to adjudicate claims is ill-conceived, wholly unauthorized, and should be rejected in its entirety.

CONCLUSION

This Court should reverse the decision below and require FSLIC, like other litigants, to adjudicate controversies in state and federal courts where the procedures afforded can provide full, adequate and impartial resolution of all claims.

Dated: May 5, 1988

Respectfully submitted,

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BRIEF OF AMICUS CURIAE NATIONAL COUNCIL OF SAVINGS INSTITUTIONS IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-996

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER FOR FIRSTSOUTH, F.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE NATIONAL COUNCIL OF SAVINGS INSTITUTIONS IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The National Council of Savings Institutions ("National Council") is a national trade association of federally chartered and state chartered savings and loan associations and savings banks. Member institutions number approximately 500, with assets in excess of $550 billion. As a trade association, the National Council offers its members a platform for addressing their concerns to Congress and to the regulators, as well as providing a variety of educational programs and publications. The National Council has been permitted to inter-

vene as *amicus curiae* in previous legal actions affecting its members.[1]

Although no specific statistics are available, our member institutions are clearly affected by the regulatory agencies' procedures for bringing claims against receivers. Whatever the amount of current claims of National Council members against insolvent institutions, such claims will increase as more institutions are placed into receivership. Member institutions can become creditors of insolvent institutions through a variety of transactions. Loan participations are the most frequent source of these claims, but other possibilities include sales of branches or receivables, real property leases, and purchases of debt securities.

The National Council seeks intervention as *amicus curiae* because it believes that the interests of its members are best served by securing their access to the administrative procedures established by the Federal Home Loan Bank Board ("Bank Board") for settlement of claims against receivers. These procedures offer claimants a full and fair opportunity to establish their claims, at a much lower cost in time and expenses than a court proceeding. In our view, if claimants are allowed to choose between a judicial trial and the administrative process, a few litigious claimants could delay the liquidation and payout of claims by a receiver for years. Likewise, if claimants are given the option of a full-blown trial in court, after exhaustion of administrative remedies, the effectiveness of the administrative procedure will be greatly impaired, to the ultimate delay, detriment and expense of a great many creditors.

Many of our members' deposits are insured by the Federal Savings and Loan Insurance Corporation ("FSLIC") and they have a direct interest in the sound-

[1] Counsel for Petitioner and for Respondent have consented to the filing of this Brief. Their letters of consent are on file with the Clerk of the Court.

ness of the FSLIC insurance fund. They share with Amici Federal Home Loan Banks the concerns for the health of the savings and loan industry. Even those savings bank members whose deposits are insured by the Federal Deposit Insurance Corporation ("FDIC") have stated emphatically their wish to preserve the FSLIC as an insurer for thrift deposits. We agree with the sentiments expressed by the United States League of Savings Institutions ("Amicus League") when it "congratulate[d] the [Bank] Board in its efforts to clarify and streamline its regulations governing the appointment and powers of conservators and receivers" and went on to note that "it is important to give the FSLIC the broad power it needs to protect the FSLIC fund." Comments of the Amicus League on proposed FSLIC receivership claims regulations, January 30, 1986 (attached as Appendix A).[2] Although the Bank Board's statutory powers are far from unlimited, they do not have to be construed broadly to find authority to determine creditor claims against institutions for which the Bank Board has appointed the FSLIC receiver.

SUMMARY OF ARGUMENT

The Bank Board relies on a three-part statutory structure as authority for establishing its claims procedures requiring exhaustion of administrative remedies:

—12 U.S.C. § 1729(d) authorizes FSLIC as receiver to adjudicate claims;

—12 U.S.C. § 1464(d)(11) authorizes enactment of rules governing resolution of claims; and

—12 U.S.C. § 1464(d)(6)(C) precludes courts from restraining or affecting the receivership.

To allow courts throughout the country to consider claims against a single receivership could result in chaos in the liquidation process. A central consistent source for

[2] The proposed regulations were published at 50 Fed. Reg. 48970 (1985).

determining claims exists at the receivership level in each instance with review at the Bank Board, where expertise can be applied and consistency achieved—not only in individual receiverships but also from one receivership to another.

The FDIC statute specifically provides for optional adjudication in court. Because the FSLIC authority was enacted later without such provisions, we conclude Congress intended a different system. The venue provision in the FDIC's statute also differs considerably from FSLIC's by limiting claims to courts where the bank's principal office is located. 12 U.S.C. § 94. By providing expressly for judicial adjudications for the FDIC and by leaving out the venue protection for the FSLIC, Congress deliberately chose a different system for the FSLIC.

We find no merit to the Constitutional claims proferred by Petitioner. They are premature because Petitioner has not yet suffered any direct injury from the requirement to pursue the administrative process. No Article III violation occurs because FSLIC is not exercising powers of a court; the claims process is an integral part of a larger regulatory scheme. There is no right to jury trial where Congress validly delegates authority to determine administrative matters. Furthermore, equitable issues, such as claims to settle a bankrupt estate, do not give rise to a right to jury trial.

The FSLIC's dual role of determining claims while also having an interest in the final distribution is not unique in administrative law. Courts have repeatedly held in due process challenges that agencies are entitled to a presumption of fair procedures.

In view of the savings in permitting Bank Board review—both for the claimants and for FSLIC—we support this opportunity for an administrative remedy. Complainants who believe they have been treated improperly may pursue judicial review.

ARGUMENT

I. FSLIC and the Bank Board Have Statutory Authority to Determine Receivership Claims.

The Bankruptcy Code expressly exempts insolvent banking institutions, including savings and loans, from the debtors it reaches. 11 U.S.C. § 109(b)(2). They "are excluded from liquidation under the bankruptcy laws because they are bodies for which alternative provision is made for their liquidation under various State or Federal regulatory laws." S. Rep. No. 95-989, 95th Cong., 2d Sess. 31, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5817. The question thus presented is, what "regulatory laws" provide for liquidation of federally chartered savings and loan associations? Congress provided initially for the liquidation of these institutions in Section 5(d) of the Home Owners' Loan Act ("HOLA"), Pub. L. 73-43, § 5(d), 48 Stat. 128; and in Section 503 of the Housing Act of 1954, Pub. L. No. 560, § 503, 68 Stat. 634, codified as amended at 12 U.S.C. § 1464 (d)(11). The original version of the HOLA provided simply that the Bank Board should have power to make rules and regulations for the liquidation of federally chartered thrifts.

The Bank Board, as early as 1941, published regulations providing for presentation of proofs to, and allowance and disallowance of claims by, FSLIC, as receiver, with review at the Bank Board. *See* 6 Fed. Reg. 4413 (1941). Those regulations, as amended provide:

> The receiver shall allow any claim seasonably received and *proved to its satisfaction.* The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor. * * * Unless, within 30 days after notice is mailed, the claimant files a written request for payment regardless of the disallowance, disallowance shall be final, except as the Board may otherwise determine.

12 C.F.R. § 549.4(b) (1988) (emphasis added).[3]

It has long been recognized by this Court that the power to "[a]llow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates," (Bankruptcy Act of 1898, § 2(a)(2), *formerly codified at* 11 U.S.C. § 11(a)(2) (repealed 1978)), constitutes the power to "adjudicate" those claims. *Katchen v. Landy*, 382 U.S. 323, 329 (1966) quoting *Lesser v. Gray*, 236 U.S. 70, 74 (1915) and *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). The Seventh Circuit in *Lyons Savings and Loan Ass'n v. Westside Banccorporation, Inc.*, 828 F.2d 387, 392 (7th Cir. 1987), noted:

> Congress has made several amendments to the statutory framework over the course of the past thirty years, . . . but has never limited the FSLIC's authority to adjudicate claims.

Similarly, the Fifth Circuit in *North Mississippi Savings and Loan Ass'n v. Hudspeth*, 756 F.2d 1096, 1102 n.2 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986), found that the regulations are evidence that adjudication is a receivership function in FSLIC receiverships.[4] Both these circuits plainly view FSLIC's statutory and regulatory scheme as granting authority to "decide" or "adjudicate" a claim with some finality.[5]

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[3] The Bank Board has published detailed interim receivership claims procedures, 53 Fed. Reg. 13105 (1988), which are to remain in effect until finalization of the Bank Board's proposed regulations, 53 Fed. Reg. 21474 (1988).

[4] The Fifth Circuit has reaffirmed *Hudspeth* in *Red Fox Industries, Inc. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987); *FSLIC v. Bonfanti*, 826 F.2d 1391 (5th Cir. 1987), *petition for cert filed*, 56 U.S.L.W. 3165 (U.S. Aug. 5, 1987) (No. 87-255); and *Chupik Corp. v. FSLIC*, 790 F.2d 1269 (5th Cir. 1986).

[5] The Ninth Circuit, however, viewed this issue as its primary difference with the Fifth and Seventh Circuits, finding that the claims process was not deciding claims, but rather whether to contest them. *See Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1218 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Associates*, —— U.S. —— 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

In 1954, Congress amended the HOLA to provide expressly that the Bank Board has authority to make rules and regulations for "associations in conservatorship and receivership, and for the conduct of conservatorships and receiverships. . . ." 12 U.S.C. § 1464(d)(11). Congress in 1966 again amended the HOLA to state its intent that the Bank Board be able to conduct liquidations free from interference by the courts:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

12 U.S.C. § 1464(d)(6)(C).

The Bank Board, consistent with this Court's ruling in *Katchen*, has consistently interpreted its regulations as providing FSLIC authority to adjudicate claims in the first instance without interference or parallel proceedings in the courts.[6] This procedure is consistent with all other business liquidation systems of which we are aware. All such schemes provide for adjudication of creditor claims in a single forum; many provide that initial claims determinations are to be made by an administrative or court-appointed official. *See* discussion *infra pp.* 11-15. The Bank Board's interpretation, which is clearly not "arbitrary, capricious, or manifestly contrary to the statute," is entitled to great weight. *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984); *see also FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438-439 (1986) (FDIC's interpretation of statutory scheme it is entrusted to administer is entitled

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[6] *See Community Federal Savings & Loan Ass'n v. Fields*, 128 F.2d 705, 706 (8th Cir. 1942) (FSLIC argued that failure to file claim barred suit).

to "considerable weight"); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (agency interpretation is entitled to "considerable respect").

No brief in this Court nor decision below seriously suggests that FSLIC determination of claims could not reasonably be viewed as furthering the purposes of the HOLA and the National Housing Act ("NHA"). 12 U.S.C. § 1701 *et seq.* Those purposes include liquidation of federal thrifts in "an orderly manner," 12 U.S.C. § 1729(c)(3)(B), and filling the gap left in the Bankruptcy Code for the adjudication of creditor claims against FSLIC, 11 U.S.C. § 109(b)(2).

Congress has never indicated any intent to withhold authority from the Bank Board to make rules for determination of creditor claims—one of the most basic and important liquidation functions. *See FSLIC v. Urquhart*, PCA 86-04294 WEA, slip op. at 4 (N.D. Fla. Apr. 7, 1987) (attached as Appendix B) ("had Congress intended to withhold that authority it would have expressly done so"). To find the Bank Board deprived of power to make rules for this essential function would increase greatly the cost of administering FSLIC receiverships and extend by years the time required to pay out to creditors of failed thrifts the billions of dollars in assets tied up in those receiverships. This result, which is plainly contrary to the purposes of the Bank Board's and FSLIC's enabling statutes, should not therefore be countenanced by this Court. *See Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984); *United States v. Bornstein*, 423 U.S. 303, 314-315 (1976).

The breadth of the Bank Board's rulemaking authority was recently reemphasized by this Court. In *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), the Court construed a companion section of the HOLA to give the Bank Board "plenary" powers to make rules for the *operation* of federal thrifts. The Court held "it would have been difficult for Congress

to give the Bank Board a broader mandate." *de la Cuesta*, 458 U.S. at 161, quoting *Glendale Federal Savings and Loan Ass'n v. Fox*, 459 F.Supp. 903, 910 (C.D. Cal. 1978). There is no reason to give the agency's liquidation powers a narrower reading.

II. FSLIC's Authority to Adjudicate Claims Is Subject to Review in the Courts Only Under the Administrative Procedure Act.

The National Council concurs with the views of the Bank Board that claims determinations, like other receivership functions, are ultimately subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 ("APA"). *See American Savings and Loan Ass'n v. FSLIC*, No. 86-689, Brief for the Respondent in Opposition at 7; *Hudspeth v. North Mississippi Savings and Loan Ass'n.*, No. 85-294, Brief for the Respondents in Opposition at 7.

The courts are expressly prohibited from restraining or even affecting the "exercise of powers or functions of a . . . receiver" appointed by the Bank Board. 12 U.S.C. § 1464(d)(6)(C). The NHA grants the Bank Board exclusive authority to supervise the activities of FSLIC and receiver. 12 U.S.C. § 1729(d). Court jurisdiction to adjudicate claims interferes with both the FSLIC's function of claims adjudication and the Bank Board's exclusive authority to supervise and regulate that function. Accordingly, the courts lack jurisdiction to entertain suits against FSLIC as receiver—they are specifically barred from doing so by statute.[7]

Because no role is provided for the courts in FSLIC's receivership statutes, both the Fifth and the Seventh

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[7] Even if the requirement were for nothing more than submission of claims for review and determinations as to whether disputes exist, no case or controversy with the receiver ripens until that procedure is exhausted. In this sense, the exhaustion requirement wold operate much as it does in the Federal Tort Claims Act. 28 U.S.C. § 2675.

Circuits have determined that the only statutory authority for judicial involvement in the claims process is under the APA, 5 U.S.C. § 706. *See Lyons Savings & Loan Ass'n*, 828 F.2d at 395; *Hudspeth*, 756 F.2d at 1103. The APA provides for judicial review of final agency actions on a *de novo* basis as to issues of law, but provides for review on the record of legal determinations and deference to factual findings of the agency. 5 U.S.C. § 706.

In our view, the Ninth Circuit arrived too quickly at the conclusion that courts should have *de novo* jurisdiction to entertain lawsuits against FSLIC receiverships. There is no indication in the HOLA or the NHA that the courts were intended to take such a direct role in deciding whether claims against an insolvent federal thrift should be paid. Moreover, common sense indicates that the agency should not, after it has provided an elaborate two-tier adjudicatory scheme, clearly designed to protect the rights of claimants, be required to attend court in *de novo* proceedings. Such a system would threaten additional delays and, as explained *infra* pp. 11-12, would be quite different from other liquidation schemes. In interpreting the HOLA and the NHA, the Court should choose an interpretation that furthers the purposes of the statute. *Engle*, 464 U.S. 217; *Bornstein*, 423 U.S. at 314-315. Plainly, *de novo* proceedings would not do so.

Further support for deferential review of the agency's decision to disallow claims can be found in recent amendments to the Federal Credit Union Act, by which Congress granted the National Credit Union Administration ("NCUA") authority to adjudicate claims against credit unions in liquidation. 12 U.S.C. § 1787(a)(1)(B). In explaining the amendments, the Senate Report stated that expeditious liquidation serves "to achieve minimal disruption to the financial system." S. Rep. No. 100-19, 100th Cong., 1st Sess. 25, *reprinted in* 8 U.S. Cong. & Admin. News 489, 515 (Oct. 1987).

III. Other Statutory Receiverships Systems Support the Bank Board's Interpretation of Its Statutory Scheme.

Three statutory provisions are relied upon by the Bank Board as authority for administrative claims determinations: 12 U.S.C. § 1464(d)(11) (authorizes enactment of rules governing liquidations and conduct of receiverships); 12 U.S.C. § 1729(d) (authorizes FSLIC as receiver to compromise claims and do all things necessary in connection therewith); and 12 U.S.C. § 1464(d)(6)(C) (precludes courts from "restrain[ing]" or "affect[ing]" the receivership). In order to understand how these provisions affect the claims process, the history of treatment of banking institutions in liquidations is relevant.

Prior to 1933 there were no federally chartered thrifts. There had, however, developed a form of receivership applicable to bankrupt financial institutions—statutory receiverships were largely replacing the traditional "equitable" or court-directed receiverships. The legislatures had come to recognize "that the urgent and delicate issues involved in a bank closure, affecting as they do not only large sums of money, but the credit and assets of its depositors, both small and large, are all matters ill suited for lengthy court hearings." *State ex rel. Arnold v. Egnor*, 275 S.E.2d 15, 21 (W. Va. 1981).

Statutory receiverships placed in question the role of the courts that would otherwise have retained control over the receivership. *In re Union Bank of Brooklyn*, 176 A.D. 477, 163 N.Y.S. 485 (1917) (receivership decisions of the New York Superintendent of Banks were not automatically subject to judicial proceedings). Courts recognized that where the legislature had vested statutory powers in an agency, it was not for them to contest the exercise of those powers. Although review for abuse of power was generally available, discretionary actions of the receiver could not be modified in court. *United States v. Knox*, 102 U.S. 442, 445 (1880). Contrary to

the traditional plenary powers of the courts in an equitable receivership, in a statutory receivership the legislature determines if, when, and under what circumstances decisions made by the receiver may be subject to court review. *See Wm. Filene's Sons Co. v. Weed*, 245 U.S. 597, 602 (1918) ("When a statutory [receivership] system is administered, the only question for the courts is what the statutes prescribe").

By 1934 when Congress created FSLIC, 23 states had enacted purely statutory liquidation schemes for insolvent building and loan associations and another six provided for judicial appointment of receivers, but gave those receivers a level of freedom from court interference similar to that of purely statutory receivers. Note, *Statutory Control Over the Dissolution of Building and Loan Associations*, 35 Colum. L. Rev. 265, 267 n.20 and n.21 (1935). It is not surprising then that Congress did not provide for judicial determination of claims. The principle of limited, deferential judicial review with regard to statutory receiverships was well established long before the enactment of federal thrift receiverships in the NHA. *See* 12 U.S.C. § 1729(b)(1)(A). It is reasonable to interpret this history in support of the Bank Board's authority under 12 U.S.C. § 1464(d)(6)(C) to establish a regulatory claims procedure to resolve claims against the receiver and subject only to APA review in the courts.[8]

[8] At least one state system provides expressly for administrative determination of claims subject only to deferential review under the state Administrative Procedure Act in the courts. W. Va. Code §§ 31A-7-13, 31A-7-14, 31A-7-15. Virtually all state systems provide for consolidation of claims in a single forum, but many state laws are vague about the standard of review of the receivers' decisions to disallow. *See, e.g.*, N.C. Gen. Stat. §§ 54B-70 (1981) (administrator authorized to promulgate regulations governing payment of claims and has authority to "pass on" claims); *Citizens State Bank of Noblesville v. Wright*, 19 N.E.2d 258, 262 (S. Ct. Ind. 1939) (determination by Attorney General and State Auditor has same effect as court order).

IV. Other Federal Banking Statutes Confirm FSLIC's Exclusive Authority to Adjudicate Claims.

When the FDIC is appointed by the Comptroller of the Currency ("Comptroller") to act as a receiver for a closed national bank, the two-tier review structure created by the Bank Board is not available. The more limited nature of the FDIC's claims process results from the National Bank Act's ("NBA") explicit provision that claims may be determined administratively by the Comptroller or by seeking adjudication in court. *See* 12 U.S.C. § 194.[9] Because this statute was in existence prior to the Bank Board's statutes, it might be expected that Congress would provide a similar right to judicial adjudication in the Bank Board and FSLIC statutes. It chose not to however, instead delegating to the Bank Board broad authority to make rules for liquidations, including, it seems logical to conclude, rules for determination of creditor claims. Furthermore, FSLIC's power to settle or release claims subject only to the regulation of the Bank Board has no parallel provision in the FDIC legislation. The NBA differs from the FSLIC system in another important detail—venue of all claims against FDIC as receiver is exclusive in one of the courts (state or federal) where the bank's principal office is located. *See* 12 U.S.C. § 94. Adjudication of creditor claims is thus consolidated by statute in a single forum. No similar provision exists in the Bank Board's statutes to protect FSLIC receiverships from defending claims in courts around the country. By failing to include in the HOLA any express provision for judicial adjudication of creditor claims and by also leaving out the protective venue provisions of the NBA, Congress deliberately chose a different system for Bank Board-supervised receiverships. Congress clearly delegated to the Bank Board the task of devising a system for deciding and consolidating creditor claims in a single forum.

[9] The Comptroller currently takes no role in claims determinations, however.

The NCUA's statutory authority is particularly enlightening to this case. The Federal Credit Union Act ("FCUA") provided that a liquidating agent for a federal credit union "shall have power and authority, subject to the control and supervision of the Board and under such rules and regulations as the Board may prescribe, . . . to receive, examine, and pass upon all claims against the Federal credit union in liquidation." 12 U.S.C. § 1766(b)(3)(B). The Ninth Circuit in *Morrison-Knudson Co., Inc. v. CHG Intl, Inc.*, 811 F.2d 1209 (9th Cir. 1987), indicated that this language could be read to provide expressly for adjudication. *Morrison-Knudsen*, 811 F.2d at 1219 n.3. The Competitive Equality Banking Act ("CEBA"), enacted on August 10, 1987, amended the FCUA to provide NCUA-appointed liquidators for state chartered credit unions powers to adjudicate claims of creditors. The amendment is worded almost exactly the same as Section 1464(d)(6)(C). 12 U.S.C. § 1787(a)(1)(B).[10] The Congress stated the following purposes in enacting these amendments:

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[10] Except as otherwise provided in this subparagraph, no court may take any action for or toward the removal of any liquidating agent or, except at the instance of the [National Credit Union Administration] Board, restrain or affect the exercise of powers or functions of a liquidating agent.

12 U.S.C. § 1787(a)(1)(B).

The description of the National Credit Union Administration Board's liquidator's functions was also amended to mirror Section 1729(d):

> In connection with the liquidation of any insured credit union, the Board shall have the power to carry on the business of and collect all obligations to the credit union, to settle, compromise, or release claims in favor of or against the credit union, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Board, or, in cases where the Board has been appointed liquidating agent solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

12 U.S.C. § 1787(j).

> The Committee expects that liquidations conducted under this section *shall be accomplished as expeditiously as possible in order to achieve minimal disruption to the financial system.* Creditor, member and other claimants must be dealt with in a fair manner. These amendments clarify the [National Credit Union Administration's] authority to adjudicate liquidation claims. Upon final agency action, a claimant may seek recourse in court under the provisions of the Administrative Procedure Act.

S. Rep. No. 100-19, 100th Cong., 1st Sess. 25, *reprinted in* 8 U.S. Cong. News 489, 515 (Oct. 1987) (emphasis added).

This recent statement of the Congress also emphasizes the need for powers to resolve creditor claims expeditiously, in order to avoid "disruption" to the financial system. The language is thus a strong indication that Congress, which was undertaking a major overhaul of many banking statutes in the CEBA, presumed that the Bank Board's powers would be similarly interpreted.

V. There Is no Serious Question That FSLIC Has Exclusive Authority to Decide Claims Against the Receiverships That It Operates.

There is no serious question that claimants against FSLIC receiverships should be required to exhaust the administrative claims process. The Bank Board has broad authority to establish regulations to allow liquidation of failed thrifts "in an orderly manner." 12 U.S.C. § 1729(c)(3)(B). The Ninth Circuit found in *Morrison-Knudsen*, 811 F.2d at 1223, that the FSLIC's "interest in applying its expertise, correcting its own errors, making a proper record, and maintaining an efficient, independent administrative system" justifies imposing an exhaustion requirement in particular cases. Even Petitioner points out,

> FSLIC has the right in the first instance to decide whether to pay or refuse to pay a claim; and the Board can overrule FSLIC's decision just as the management of an insurance company can overrule the decisions of a claims adjuster. However, if the ultimate administrative decision is not to pay, the resulting dispute must then be resolved by the courts.

Petitioner's Brief ("Pet. Br.") at 26.

The purposes of an exhaustion requirement will be in large part unaccomplished, however, if claimants can, as the Ninth Circuit suggests in *Morrison-Knudsen*, repeatedly contest the need to exhaust in judicial proceedings. The result of that court's approach would be scores of costly legal battles in the courts over the need to exhaust, which will deplete the already insolvent receivership estates.

Moreover, because, as we argue *supra* p. 9, the exhaustion requirement is clearly a jurisdictional prerequisite to suit, there can be no exception. The Bank Board has established a mandatory scheme for FSLIC, as receiver, to review, allow and disallow claims. Valid regulations have been in place for 47 years. *See Morrison-Knudsen*, 811 F.2d at 1217 (recognizing validity of receivership claims regulations). These regulations have the force and effect of law. *de la Cuesta*, 458 U.S. 141, 153-154 (1982), *Milberg v. Lawrence Cedarhurst Federal Savings and Loan Ass'n*, 496 F.2d 523, 524 (2d Cir. 1974). The HOLA, 12 U.S.C. § 1464(d)(6)(C), clearly prohibits any interference by the courts with such functions of the receiver. Accordingly, no court may entertain claims against the receivership prior to administrative exhaustion. *Lyons Savings and Loan Ass'n*, 828 F.2d at 395; *Hudspeth*, 756 F.2d at 1103.

VI. Petitioner and the Amici Curiae for Petitioner Have Presented no Compelling Arguments in Opposition to the Conclusion That the FSLIC Has Exclusive Authority to Adjudicate Claims in the First Instance.

Petitioner argues that Section 1464(d)(6)(C) provides no authority for the conclusion that the FSLIC has exclusive authority to adjudicate claims in the first instance. According to Petitioner, Section 1464(d)(6)(C) must either be interpreted as permitting judicial adjudication of claims in the first instance or, alternatively, as a complete prohibition on judicial review, including APA review of administrative determinations. Amicus League also argues that FSLIC's reliance on Section 1464(d)(6)(C) "would mean that Congress intended to delegate to the discretion of the FSLIC as receiver authority to determine claims that is completely unreviewable." (Amicus League Br. at 23). We disagree. Absent specific congressional direction, there is a strong presumption that agency action is subject to judicial review. *See Traynor* v. *Turnage*, —— U.S. ——, 108 S.Ct. 1372, 1378 (1988); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). By Section 1464(d)(6)(C), Congress intended to prohibit judicial determination of claims in the first instance, because such adjudications would have the greater tendency to "restrain or affect" the receiver; but there is nothing in the language of the section to suggest that Congress intended to disrupt the courts' long standing jurisdiction to review final agency determinations under the APA. This conclusion is strengthened by the similar schemes applicable in other liquidations and the absence of any system where a receiver's or liquidator's decision is wholly unreviewable in court.

Petitioner and the Amicus League also rely on the power of the FSLIC to "sue and be sued", 12 U.S.C. § 1725(c)(4), as well as the NHA's three year limitation on depositor actions against FSLIC, 12 U.S.C. § 1728(c), as authority for the proposition that the FSLIC lacks exclusive jurisdiction. Unfortunately, Petitioner and the

Amicus League have failed to comprehend the dictinctions between FSLIC's corporate and receivership capacities and in so doing, have relied upon provisions that are inapposite to the issues presented to this Court. There is nothing to suggest that Congress intended these statutes to apply to FSLIC in its capacity as receiver. Rather, it is clear that the "sue and be sued" authority refers to FSLIC's corporate capacity. In its receivership capacity, FSLIC is subject only to the jurisdiction of the Bank Board or other appropriate state authority. 12 U.S.C. § 1729(d). Similarly, with respect to 12 U.S.C. § 1728(c), FSLIC makes insurance coverage determinations only in its corporate capacity. Section 1464(d)(6)(C)'s prohibition against restraints on receivership functions clearly does not apply to FSLIC in its corporate capacity as insurer of deposits.

Petitioner also argues that 12 U.S.C. § 1730(k)(1), which "was intended to keep certain actions in state courts, indicates what type of suits Congress expected to defend against in state courts" and by implication the type of suits Congress intended FSLIC to defend in federal court. (Pet. Br. at 27). Again, Petitioner's reference is misplaced. Section 1730(k)(1) merely allocates jurisdiction between state and federal courts. It is not an independent grant of jurisdiction.

Moreover, the Section 1730(k)(1) proviso accomplishes with respect to state-supervised receiverships what Section 1464(d)(6)(C) accomplishes with respect to Bank Board-supervised receiverships.[11] Both Section 1730(k)(1) and

[11] Section1730(k)(1) provides: "[A]ny action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court." 12 U.S.C. § 1730(k)(1).

Section 1464(d)(6)(C) were passed in 1966 as part of the same amendments to the Bank Board's and FSLIC's statutory schemes. Both sections have the effect of consolidating claims against the receivership estate, *i.e.*, claims by "investors, creditors and stockholders," in the courts or other authorities overseeing the receiverships. Both sections are also consistent with Section 1729(d), which centralized "regulation" of claims functions under the authority of the Bank Board or, if a state-appointed receiver, under the appropriate state authority, whether administrative or judicial.

Amicus League argues that "modern principles of judicial economy and evenhandedness are sacrificed" by what Amicus League views as the risk of a bifurcated process whereby the FSLIC would proceed in court for determination of liabilities and enforcement, while its party opponents would simultaneously be relegated to the administrative track for resolution of their disputes. (Amicus League Br. at 7). Both Petitioner and Amicus Watson make a similar argument (Pet. Br. at 29, n.23; Amicus Watson Br. at 8-10) in which they hypothesize that requiring that claims against insured thrifts follow an administrative track will likely result in a possibility of a single controversy, arising out of the same set of operative facts, being subject to simultaneous proceedings in two forums.

Petitioner and the Amici misunderstand the regulatory scheme at issue here. By creating an administrative track whereby FSLIC has exclusive authority to adjudicate claims against failed institutions in the first instance, Congress has provided a mechanism for speedy identification of those with valid claims against receivership assets. Where the switching of counterclaims against the receiver to the administrative track could result in parallel consideration of the same facts or issues, one forum or the

other may stay its proceedings pending completion of the other.[12] The claimant can always request expedited consideration in the claims process to avoid problems in defending against FSLIC in court. 53 Fed. Reg. 13105, 13112 (1988). In any event, the Bank Board has concluded that the benefits of consolidating claims against the estate outweigh the burden of possibly re-litigating some issues in suits brought by the receiver. Given the fact that most, if not all, other liquidation schemes also consolidate claims determinations, this is hardly an unreasonable conclusion.

Finally, Amicus League's reliance on *Riehle v. Margolies*, 279 U.S. 218 (1929), *Morris v. Jones*, 329 U.S. 545 (1947), and *Grant v. Buckner*, 172 U.S. 232 (1898), is also misplaced. Amicus League relies on these cases for the proposition that "courts traditionally have determined the validity of disputed claims without restraining or affecting a receivership." (Amicus League Br. at 22). In our view, such cases are not relevant because they all involved receivership systems quite different from the one at issue. As the Court made clear in *Morris*, 329 U.S. at 553, nothing prohibits a procedure for statutory receivers to decide claims, "except as such procedure collides with the Federal Constitution or Act of Congress." [13] (Citation omitted).

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[12]Most counterclaims are severable from the main action, however. *See, e.g., FSLIC v. Ziegler*, 680 F. Supp. 235, 238 (E.D. La. 1988), where the court concluded that, despite the characterization of its claim as an affirmative defense, Defendant Ziegler had "come forward with no evidence that it is anything other than a separate claim for compensation, which under *Hudspeth*, must first be submitted to the FHLBB, with review available under the Administrative Procedure Act."

[13] Because *Morris* involved a state scheme, it was held to "collide" with the Full Faith and Credit Clause. U.S. Const. art. IV § 1. FSLIC's scheme involves no such infirmity. *Id.*

VII. The Statutory Scheme Created for Resolution of Claims Against Failed Savings and Loan Associations Does Not Violate the United States Constitution.

A. *The Constitutional Arguments Raised By Petitioner Are Not Ripe for Resolution.*

Because Petitioner cannot show that it will suffer immediate and direct injury unless the Court reaches constitutional issues, its claims are not ripe for resolution by the Court at this time. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974); *Liverpool, New York & Philadelphia Steam-Ship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885) (the Court "is bound . . . never to anticipate a question of constitutional law in advance of the necessity of deciding it"). " 'The Party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement . . . .' " *Poe v. Ullman*, 367 U.S. 497, 504-505 (1961), quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (brackets in original). *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020 (1984), where the Supreme Court held that a challenge on Article III grounds to a statutorily-mandated arbitration system was not ripe until an arbitrator had issued an award. The rationale for requiring exhaustion is that until appellees have been injured, there is no "case" or "controversy." The doctrines of finality and ripeness counsel courts to defer ruling on constitutional questions until completion of the administrative process. As the Supreme Court reasoned in *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980):

> Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.

(Citations omitted).

Courts should avoid entangling themselves in abstract disagreements over agency policies and should protect administrative agencies from judicial intervention until administrative results are final and have concrete effects upon the parties. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

Because Petitioner has not yet completed the claims procedure, it cannot show that it has sustained any direct injury as a result of having to pursue the process. In fact, Petitioner may receive full satisfaction of its claims without resort to the judicial process. That being the case, its constitutional challenge is not yet ripe. *See Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 772-773 (1947) (possibility that claims will be decided favorably without resort to constitutional challenge to process makes the constitutional challenge unripe).

Finally, it is well settled that Petitioner must exhaust the administrative process even for challenges to the administrative process itself. *See, e.g., Hirsch*, 331 U.S. at 752. As the Seventh Circuit has recognized, "[s]o long as effective means for judicial review are ultimately available where the constitutional claims can be raised, appellant may not dispense with the requirement of prior administrative review, otherwise judicial review would be an abstract process." *Gaunce v. DeVincentis*, 708 F.2d 1290, 1293 (7th Cir.), *cert. denied*, 464 U.S. 978 (1983). *See also Weinberger v. Salfi*, 422 U.S. 749, 762 (1975).

B. *FSLIC's Receivership Claims Process Does Not Violate Article III of the United States Constitution.*

Article III, Section 1 of the United States Constitution provides that the judicial power of the United States shall be exercised by judges with tenure and protected from diminution of their salaries. U.S. Const. art. III, § 1. FSLIC is not staffed by "judges" with tenure and salary protection and therefore is not an Article III court. Nevertheless, the constitutionality of a delegation of decision making authority to a non-Article III tribunal does not turn on conclusory deference to the language of the Constitution. "Rather, the constitutionality of a given congressional delegation . . . must be assessed by reference to the purposes underlying the requirements of Article III." *CFTC v. Schor*, 478 U.S. 833, 106 S. Ct. 3245, 3256 (1986).

The preliminary administrative resolution of claims against the assets of a failed institution clearly does not violate Article III of the United States Constitution. As the Court has held, "Article III does not confer on litigants an absolute right to plenary consideration of every nature of claim by an Article III court." *Schor*, 106 S. Ct. at 3256. Instead, "the constitutionality of a given congressional delegation . . . must be assessed by reference to the purposes underlying the requirements of Article III." *Id.* The administrative determination of receivership claims is an essential part of a complex regulatory scheme in which there is a unique federal interest. Moreover, the rights at issue with respect to such claims are public rights, and the essential attributes of judicial power are retained in federal courts. In fact "[m]any matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985).

The Supreme Court has considered the constitutionality of delegations of judicial power several times in recent years and provided substantial guidance on the scope of the Article III requirements. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court ruled unconstitutional a bankruptcy court's adjudication of a state law contract action by a debtor against a third party not otherwise subject to the bankruptcy court's jurisdiction. While a plurality of the Court engaged in a broad discussion of Article III, the

Court's holding was substantially more narrow. (Rehnquist, J., concurring in the judgment). The holding of *Northern Pipeline* was only that Congress may not vest in the bankruptcy courts the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, where the adjudication was without consent of the litigants and subject to ordinary appellate review. *Id.* at 89-92.

More recently, in *Schor*, the Court held that the Commodity Futures Trading Commission ("CFTC") regulations permitting the agency to adjudicate state law counterclaims did not violate Article III. The Court adopted a pragmatic approach, requiring that the constitutionality of a congressional delegation of adjudicative authority "be assessed by reference to the purposes underlying the requirements of Article III." *Schor*, 106 S. Ct. at 3256. The Court reasoned that the CFTC dealt only with a particularized area of law, issued orders enforceable only by order of federal courts, was subject to judicial review of both its factual and legal findings, and could not exercise all ordinary powers of district courts. The Court further held that the congressional purposes in authorizing an administrative agency to adjudicate state law claims—efficiency—outweighed the interests in requiring such claims to be adjudicated in Article III courts. *Id.* at 3259-60.

Like the CFTC in *Schor* and unlike the bankruptcy judges in *Northern Pipeline*, FSLIC and the Bank Board have no authority to preside over jury trials, issue writs of *habeas corpus*, or cite individuals for contempt. *Compare Schor*, 106 S. Ct. at 3259, with *Northern Pipeline*, 458 U.S. at 85. FSLIC and the Bank Board have no power to compel process or issue any kind of order. Like the CFTC, and unlike bankruptcy judges, FSLIC and the Board have no power to enforce determinations upon other parties. *Compare Schor*, 106 S. Ct. at 3259, with *Northern Pipeline*, 458 U.S. at 85. FSLIC as receiver

merely has the limited power to withhold payment from the estate. Pursuant to the APA, review of Bank Board decisions of law would be *de novo*, and review of findings of fact would be subject to the "arbitrary and capricious" standard of review. In our view this standard is fully adequate to preserve the essential role of Article III courts. *See* Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 976-991 (1988).

Other than the power to decide claims in the first instance, under the FSLIC scheme, all attributes of judicial power remain in Article III courts. This scheme is not unique, but is consistent with other federal agencies empowered to adjudicate issues within their area of expertise, such as the National Labor Relations Board, the Social Security Administration, the Federal Trade Commission and dozens of other agencies that perform adjudication functions subject to judicial review under the APA. For these reasons alone, the FSLIC administrative claims process withstands Article III scrutiny.

In addition, the federal government indisputably has a unique and critical interest in maintaining public confidence in the savings and loan industry. To further that interest, Congress created the Bank Board and FSLIC to regulate and supervise all aspects of the savings and loan industry.

This Court recognized in *Union Carbide* that where the claims adjudication process was "an integral part of a program safeguarding the public health," the rights being adjudicated were, at least partly, in the nature of public rights. *Union Carbide*, 473 U.S. at 589. The safety and soundness of the nation's banking system is no less an important government interest than the public health and the receivership claims process is similarly an "integral part" of the regulatory scheme to preserve the health of the system. Accordingly the rights being adjudicated,

like those at issue in *Union Carbide*, need not be initially routed to an Article III forum.

To summarize, because Article III courts retain the essential attributes of judicial power over receivership claims, because the disputes delegated to FSLIC for initial adjudication are of the kind that need not be directed to an Article III court, and because Congress had weighty reasons for giving FSLIC adjudicatory power, the administrative claims process is fully consistent with Article III.

C. *FSLIC's Receivership Claims Process Does Not Violate the Seventh Amendment to the United States Constitution.*

The Seventh Amendment right to jury trial does not bar FSLIC adjudication of claims in the first instance. As this Court has stated repeatedly, "there is little or no basis for concluding that the Amendment should . . . be interpreted to provide an impenetrable barrier to administrative factfinding under *otherwise valid* federal regulatory statutes." *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 460 (1977) (emphasis added). *See also Curtis v. Loether*, 415 U.S. 189, 194 (1974) ("[T]he Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme") (footnote omitted).

Where Congress validly delegates authority to adjudicate claims to an administrative agency, such as in the FSLIC scheme, the Seventh Amendment does not bar that delegation even though the trial right might have applied had Congress left authority to adjudicate those claims with the courts. *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974), explaining *Block v. Hirsch*, 256 U.S. 135, 158 (1921).

Moreover, in order to prevail on a Seventh Amendment right to jury trial challenge, the action at issue must be the type that would have been tried in courts of law, rather than courts of equity or admiralty at the time the Seventh Amendment was adopted. *Atlas Roofing*, 430 U.S. at 449. Claims raising equitable issues or seeking equitable relief do not give rise to the jury trial right. *Id.*; *Katchen*, 382 U.S. at 336-338. Because Petitioner's claims against FirstSouth assets are now claims against the receivership estate of a FSLIC liquidating receiver, they are in the nature of claims against a bankrupt estate. This Court has held that claims against a bankrupt estate sound in equity not in the common law, and that therefore the right to jury trial is inapplicable. *See Katchen*, 382 U.S. at 336; *Barton v. Barbour*, 104 U.S. 126, 134 (1881) ("a claim of a debt or damages against the bankrupt is investigated by chancery methods"). The Court has explained that even if a claimant against a bankruptcy estate might otherwise be entitled to a jury trial, "when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity. The Bankruptcy Act, passed * * * to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro rata share of the *res* . . . ." *Katchen*, 382 U.S. at 336.

The HOLA and NHA statutes serve the same function as the old Bankruptcy Act. They create an orderly process for the allowance and disallowance of claims against an insolvent institution, so that *pro rata* shares of the receivership estate may be determined. *Cf. Barton*, 104 U.S. at 134 ("Very analogous to the case of an assignee in bankruptcy is that of a receiver of an insolvent railroad company or other corporation"). Thus, they too convert legal claims into equitable ones. Accordingly, FSLIC, like the bankruptcy courts under the old Bankruptcy Act, need not provide a jury trial when performing its claims determination function.

D. *FSLIC's Receivership Claims Process Does Not Violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.*

Petitioner argues that the FSLIC's adjudicatory scheme deprives potential claimants of due process, because of FSLIC's dual function of insurer and liquidator. As insurer, FSLIC reimburses the depositors of the defaulting savings and loan and becomes subrogated to their claims against the receivership estate. As liquidator, FSLIC marshals the savings and loan's assets and pays valid credit obligations according to the list of priorities and to the extent of available assets. The fewer claims that ultimately are allowed, the more money that FSLIC is able to recoup as subrogee to the depositors' claims. This syllogism creates what Petitioner views as an inherent conflict of interest in violation of due process.

Congress has charged FSLIC and the Bank Board with the responsibility of maintaining the financial stability of the savings and loan industry. Accordingly, FSLIC and the Bank Board have a strong interest in fostering public confidence in the fairness of liquidation proceedings in order to maintain the public's faith in the savings and loan industry and its regulators. There is no reason to think that in carrying out the receivership role Congress assigned it, FSLIC will do anything other than give "due consideration to the interest of all of the claimants upon the assets of the association." S. Rep. No. 90-1263, 90th Cong., 2d Sess. 10, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2539; *see also Womble v. Dixon*, 752 F.2d 80, 81 (4th Cir. 1984) (even if a conflict between FSLIC's dual roles does exist, there is no reason to assume "that the FSLIC will not carry out its statutory duties").

Moreover, FSLIC's role as insurer is completely separate from FSLIC's role as receiver. Even with respect to the same defaulting institution, there is no overlap between FSLIC's insurance personnel and FSLIC's receivership personnel. Furthermore, the remuneration of those

who evaluate claims is fixed. These personnel have no incentive to disallow claims that otherwise would reduce the funds available to FSLIC as subrogee. This lack of a personal stake was important in this Court's analysis of the child labor enforcement provision of the Fair Labor Standards Act upheld against a due process challenge in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). Here, as in *Jerrico*, the possibility of inherent bias is minimized by the absence of incentives for FSLIC adjudicators to deny claims unjustly.

FSLIC's dual functions are not unique in administrative law. The Social Security Administration ("SSA") adjudicates disputes involving direct disbursements from various insurance trust funds it administers. SSA's interest in the outcome is analogous to FSLIC's because SSA too has conflicting responsibilities to conserve the trust funds, but also to pay valid claims. Indeed, the "conflict" in FSLIC's dual role is less significant than SSA's because FSLIC in its corporate capacity is merely a competing creditor, not the guardian of the receivership funds. It is only in its entirely separate receivership capacity that FSLIC exercises this latter function.

This Court has repeatedly stressed that the challenger's burden to establish a *per se* due process violation is a heavy one. There is a "strong presumption in favor of the validity of congressional action" in light of the Court's recognition of the " 'congressional solicitude for fair procedure . . . .' " *Schweiker v. McClure*, 456 U.S. 188, 200 (1982), quoting *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). Furthermore, agencies are entitled to a presumption "that they will act properly and according to law." *FCC v. Schreiber*, 381 U.S. 279, 296 (1965). As the Court said in dismissing a due process challenge to the Bank Board's dual roles of appointing conservators and presiding over hearings to determine whether the conservators were properly appointed, it is inappropriate for courts to "assume in advance that an administrative hear-

ing may not be fairly conducted." *Fahey v. Mallone*, 332 U.S. 245, 256 (1947).

In view of the foregoing, it must be concluded that Petitioner has failed to demonstrate that FSLIC's administrative claims process violates due process laws.

CONCLUSION

The National Council believes that the Bank Board and FSLIC have authority to promulgate regulations for apportioning assets of institutions in receivership, and that these procedures are subject to judicial review under the APA. They provide an opportunity for claimants to receive a determination of their claims, while conserving assets of the failed institution. These procedures further the purposes of Congress as expressed in the HOLA and NHA, and they are in the best interest of the thrift industry.

Respectfully submitted,

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APPENDICES

APPENDIX A

USL

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January 30, 1986

Director, Information Services Section
Office of the Secretariat
Federal Home Loan Bank Board
1700 G Street, N.W.
Washington, D.C. 20552

RE: Resolution No. 85-1007

Dear Sir:

We congratulate the Board in its efforts to clarify and streamline its regulations governing the appointment and powers of conservators and receivers. We are appreciative of the Board's concern that it be able to act in a timely fashion before the assets of an ailing association are dissipated and of the need to generally maintain the priority of the FSLIC as a creditor over other parties

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* The U.S. League of Savings Institutions, serves the more than 3,500 member institutions which make up the $1.1 trillion savings association and savings bank businesses. League membership includes all types of institutions—federal and state-chartered, stock and mutual. The principal officers include: Gerald J. Levy, Chairman, Milwaukee, Wisconsin; Joe C. Morris, Vice Chairman, Emporia, Kansas; William B. O'Connell, President, Chicago, Illinois; Philip Gasteyer, Executive Vice President and Director of Washington Operations; and Rita I. Fair, Senior Vice President, Regulatory Operations. League headquarters are at 111 East Wacker Drive, Chicago, Illinois 60601. The Washington office is located at 1709 New York Avenue, N.W., Washington, D.C. 20006. Telephone: (202) 637-8900.

who have dealt with the association because of the overwhelming public necessity of maintaining the integrity of the FSLIC fund. The U.S. League recognizes that some of these proposals may, in particular instances, impose a hardship on some of its member institutions or those who deal with one of those institutions. We nevertheless generally support the Board's regulations because of the overriding public need to protect the FSLIC fund. We recognize that it is important to give the FSLIC the broad power it needs to protect the fund and to maintain public confidence in the financial institution community. However, we believe that some provisions may be counterproductive and may erode public confidence in savings institutions and their ability to effectively compete in the marketplace. This is particularly true in secondary market activities and in areas where associations are selling securities chiefly through finance subsidiaries in instances where the protections afforded to the FSLIC may make it impossible for associations to deal in the broader securities and secondary mortgage markets because of the lack of certainty as to whether their contracts will be honored in the event of receivership.

The secondary market and securities activities are particularly sensitive because the holders of mortgage participations or mortgage-backed securities have no direct knowledge of the institution and should not be held accountable for what may subsequently happen to the institution.

We also are concerned that the rights of all shareholders to contest the appointment of a receiver be recognized so that the extensive flow of capital into associations which has occurred in the last three years through mutual stock conversions will not be jeopardized. The Board has actually encouraged conversion from mutual to capital stock because such conversion provides a cushion to the Federal Home Loan Bank Board and, thus, helps protect the insurance fund. To the extent the regulations ignore the rights of minority shareholders, they may be jeopardizing the inflow of capital into institutions.

Our specific comments as to the regulations are as follows:

(1) *Finance Subsidiaries*

The regulations should specifically state that the finance subsidiary of an institution which is put into receivership will remain separate and will not be considered an asset of the receivership nor will the FSLIC void transactions of the finance subsidiary. This is the essence of the FHLBB General Counsel opinion dated March 23, 1984. However, the General Counsel's opinion was a little nebulous in that it stated "a court would not uphold the receiver's attempt to disregard the separateness of the subsidiary". We would hope that the FHLBB would go further and specifically state that the receiver would not attempt to disregard the separateness of the subsidiary, assuming that the finance subsidiary regulations were complied with.

(2) *Secondary Market Considerations, 569c.10.*

We are very appreciative of the Board's codification of the general rule characterizing loan participations as true sales and not as creating a debtor-creditor relationship. As the Board noted in its comments the Bankruptcy Law of 1978 contains specific provisions to deal with the *Hamilton Mortgage Company* case. The committee report to that statute specifically said: "Section 541(e) makes clear that the seller's retention of the mortgage documents and the purchaser's decision not to record do not impair the asset sale character of secondary mortgage market transactions. The committee notes that in secondary mortgage market transactions the parties may characterize their relationship as one of trust, agency, or independent contractor. The characterization adopted

by the parties should not affect the statutes in bankruptcy of *bona fide* secondary mortgage market purchases and sales."

It would indeed be an anomaly if associations were better protected dealing with institutions which were subject to the Bankruptcy law rather than savings institutions which are subject to the receivership and conservator provisions of the FHLBB.

However, as the Board noted, there have been decisions involving the FDIC where even though the sale nature of the participation interest was noted, the participation holder had his rights extinguished by the original borrower's right of offset.

Such a right of offset would work as follows. Assume a borrower has borrowed $500,000 from the savings institution. The savings institution then sells one-half of that interest to a third party in the secondary market. The borrower then makes a $500,000 deposit with the institution and the institution goes into receivership. As the Board itself notes, some courts have allowed the borrower to offset his mortgage note with the savings deposit which could leave the buyer of the participation interest in such a case with nothing. In a situation where, for example, the borrower had a $500,000 savings deposit, he would be able to offset that against the $500,000 note so that the entire debt would be extinguished. The third party which has bought half of that note, however, is not aware of any of these other transactions. It has bought for good value one-half the interest of the note and has presumed it would be entitled to one-half the payments. It now finds out that the debt has been extinguished. In the *Mademoiselle* case, discussed by the Board, the court refused to allow the third party purchaser the right to have a preferred claim to its share of the offset. If the FHLBB does not grant such third party purchasers the right to a preferred

claim to their share of offset, there will be continuing uncertainty in the secondary market as to what the purchaser is really buying. Even warranties made at the time of sale regarding deposits of the noteholder would be of no value since the noteholder could put a deposit in at a subsequent time.

We agree with the Board that sales with recourse would change the nature of the transaction from a sale to more of a financing and thus should not be treated as a true sale. However, in this regard, the regulation should be clarified to insure that the recourse which is being referred to is the "recourse" as defined under the FHLBB regulation 561.8 (12 C.F.R. 561.8).

We also congratulate the Board for stating that where the association sells 100% interest in a loan but retains legal title to supervise or service the loan, the loan does not become property of the estate unless the association also retains equitable title. So that, where the association has retained legal title only for the purpose of servicing, the equitable interest in the property will not be considered an asset of receivership.

In this regard, however, we are concerned that the Board's proposed SEC 569c.5 which would prevent parties from attempting to enforce certain participation agreements. Many participation agreements, including the U.S. League's illustrative participation agreements, provide for the largest participation holder to succeed to the rights and titles of the seller regarding the servicing of the loans and to exercise those powers in the event the seller becomes insolvent or a receiver is appointed. Such provisions are needed to assure the participation holders that payments will not be in the receivership proceedings, particularly as to the servicing aspects of the loan. In this regard, we must remember that while the FSLIC has a strong public interest to assure the safety of the fund, in its zeal to do so it may have just

the opposite effect. Associations which most need to avail themselves of the flexibility of the secondary market and new financing techniques may be in fact denied access to markets because of third party fears that the association will become insolvent and the payment streams will be tied up in receivership proceedings.

Authorization to Contest Receivership Appointment, 569a.8

The proposed regulations state that the appointment of a receiver can only be contested by authorization of the board of directors. We are deeply concerned that this will result in the freeze-out of minority shareholders which may very well have interests separate from the interests of the majority shareholders. Since the appointment of the receivership may, as a practical matter, result in the total extinguishment of their investment in the institution, they should have the right to contest the appointment of the receiver even if the board of directors does not do so. To freeze-out minority shareholders in this manner will have just the opposite effect the Board intended, as it may limit the flow of capital into institutions if they realize that the rights of capital stockholders will be so easily disregarded and thus increase the exposure of the FSLIC fund.

Management Contracts, (563.39(a))

We agree with the Board that there have been instances where associations may have acted improperly by providing for excessive bonuses upon the appointment of a conservator or receiver. We do not object to the Board's providing that there should not be a bonus, severance pay or other compensation related to the appointment of a receiver or conservator as such. However, we strongly disagree that employment contracts entered into before the appointment of a receiver would be automatically terminated. This would prevent those

associations which are most in need of professional managers from obtaining those managers since no professional manager would enter into an agreement with an association where there was a possibility within one or two years it might be in receivership and his employment contract would be ended. Employment contracts should be allowed to continue as in the case of other catastrophic events such as takeovers or mergers; there should be no difference.

Avoidability of Contracts, 569a.8

Contracts voided by the FSLIC should be restored if a court later finds the appointment invalid. The Board itself has stated that contracts entered into by the receivership cannot be voided even if the court finds that the receivership was invalid and the affairs should be turned back to the association. While we are not enthusiastic about the FHLBB's position that even where a receivership is subsequently declared invalid the contracts entered into by the FSLIC would nevertheless remain valid, we understand the need for the receiver to have public confidence when it enters into public contracts so that those contracts will be upheld. The same considerations of public confidence require the opposite conclusion where a receiver is invalidating existing contracts with the institution. This, in fact, undermines confidence and although we understand the Board's need to have this power, we believe that where the receivership is subsquently declared invalid, those contracts which were voided should be reinstated. We believe this would have a salutory effect in that it would act as a restraining force. It would also prevent the temptation to be too aggressive in appointing receivers to avoid existing contracts which may be just "bad deals". From a cynical point of view some observers might argue that the FSLIC could protect its fund by asserting receivership authority, voiding contracts which would remain

void even though it would subsequently be held that there were no grounds for receivership. Clearly, the Board would, in fact, not do this knowingly, but we believe it is important to maintain the public's perception of equity in this area. If such is indeed the perception, associations below or near regulatory net worth may indeed find it difficult to enter into any contracts where the FSLIC would theoretically have such an easy way out.

Prepayment Penalties, 569c.8d(2)

We frankly do not agree with the characterization of prepayment fees which may be in excess of the usual interest rate loss as "windfalls". These prepayment clauses are bargained for to avoid guessing games as to the precise nature of the damages. In essence, these are liquidated damages which are designed to avoid protracted litigation and uncertainty. To disregard this bargained for consideration and substitute instead actual damages would invite further uncertainty and represent a usurpation of the relevant contractual provisions. Again, we commend the Board for its comprehensive revision of the regulations and for its aggressive stance in trying to protect the integrity of the FSLIC fund and thus public confidence in all financial institutions. Thank you for this opportunity to comment.

Sincerely

/s/ Robert W. Bartlett
ROBERT W. BARTLETT
Senior Vice President and
Director of Technical Services

RWB/blk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PCA 86-04294 WEA

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
as Receiver for AUDUBON FEDERAL SAVINGS AND
LOAN ASSOCIATION,
Plaintiff,

vs.

J. W. URQUHART, JR., *et al.*,
Defendants.

MEMORANDUM DECISION

In October of 1985, Audubon Federal Savings and Loan Association (Audubon) instituted foreclosure proceedings on properties owned by J. W. Urquhart. Fairfax Savings Association (Fairfax) filed a complaint for declaratory relief and a motion to intervene, based upon a participation agreement between Audubon and Fairfax and alleging breach of that agreement by Audubon.

Audubon was declared insolvent by the Federal Home Loan Bank Board (FHLBB), and it appointed Federal Savings and Loan Insurance Corporation (FSLIC) as receiver. FSLIC substituted itself for Audubon, and successfully removed the proceedings to this court. FSLIC, relying upon *Northern Mississippi Savings & Loan v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986), then moved for the dismissal of Fairfax pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of

jurisdiction. This court, following *Hudspeth*, granted that motion, holding that under 12 U.S.C. §§ 1729(d) and 1464(d)(6)(C) such claims must be resolved administratively pursuant to applicable federal regulations.

Fairfax has now moved this court to reconsider. Its motion presents a constitutional challenge based upon Article III and *Glen Ridge I Condominiums, Ltd. v. FSLIC*, No. 05-85-00873-CV, slip op. (Tex. Ct. App. December 30, 1986). Later, Fairfax provided this court with a copy of *Morrison-Knudsen Co. v. CHG International*, No. 86-2063, slip op. (9th Cir. Feb. 25, 1987), which is in direct opposition to the *Hudspeth* decision. FSLIC was given opportunity to respond to both *Glen Ridge* and *CHG*. It responded by providing a copy of appellees' motion for rehearing in *Glen Ridge*, a copy of FSLIC's petition for rehearing and suggestion of appropriateness of rehearing *en banc* in *CHG*, and copy of slip opinion in *Tamarind v. Twin Oaks*, No. 86-107-Civ.-Ft. M.-13(B).

This court, having considered the memoranda of both parties and the other authorities presented, denies the motion to reconsider for the reasons set out below.

Lack of Subject Matter Jurisdiction

In *North Mississippi Savings & Loan v. Hudspeth*, 756 F.2d 1096, 1101 (5th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986), the Fifth Circuit stated:

> In explaining the Bank Protection Act of 1968, which made § 1464(d)(6)(C) applicable in receiverships of state thrift institutions, the Senate confirmed that the FSLIC's authority "[i]n carrying out its receivership responsibilities . . . would be subject only to the regulation of the Federal Home Loan Bank Board. . . ." S.Rep. No. 1263, 90th Cong., 2d Sess. 10, *reprinted in* 1968 U.S.Code Cong. & Admin.News 2530, 2539. Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities.

To accomplish this end, disputes were relegated to the administrative process. The 9th Circuit, in *Morrison-Knudsen Co. v. CHG International*, No. 86-2063, slip op. (Fef. 25, 1987), looked at the statute and the regulations and fund that Congress did not intend the FSLIC to have the power to adjudicate claims and that the regulations overstepped the intent of Congress. Where the *Hudspeth* court found congressional intent that the FSLIC be subject only to the regulation of the FHLBB, the 9th Circuit, in *CHG*, found no such intention.

The 9th Circuit's approach was premised upon its belief that, had Congress so intended, it would have stated that intent in express terms, and because the statute nowhere expressly states the FSLIC is to have the authority to resolve the validity of a creditor's claims that authority does not exist. It is an equally valid form of analysis to state that, had Congress intended to withhold that authority, it would have expressly done so.

The problem then is to determine which analytical approach is proper in light of the statute being construed. This court believes the latter approach warranted in this instance.

12 U.S.C. § 1729(d) (1982 amendment) reads as follows:

> In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in

connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

In view of the language of § 1729(d), and the restrictions embodied in § 1728(c) (regarding despositor claims), the proper conclusion to draw is that, if Congress did not place an express limitation upon the actions or powers of FSLIC, and the actions or powers involved are regulated by FHLBB, Congress intended that FSLIC have those powers.

The court, in *CHG*, believed it illogical that disputes regarding depositor claims were not removed from judicial determination and disputes regarding creditor claims were. This court finds logic in the distinction. The primary purpose of this entire statutory scheme was to protect the average depositor from financial ruin resulting from the failure of a savings institution. This purpose would be defeated by the denial of even one valid depositor claim. This legislation was not designed to protect creditors.

Under *Hudspeth*, all claims of Fairfax are switched to the administrative process by § 1464(d)(6)(C). Fairfax can challenge the FSLIC's actions before the FHLBB and, if dissatisfied, can seek judicial review under the Administrative Procedure Act. Until such time, the statute prevents Fairfax from going forward in any court before seeking review before the FHLBB. *See e.g., Sunrise Savings and Loan Assoc. v. Lir Development Co.*, 641 F.Supp. 744, 746 (S.D. Fla. 1986).

This court concludes that 12 U.S.C. §§ 1464, 1729(d), and 1728(c) preclude courts from adjudicating creditor claims and thus dismissal due to lack of subject matter jurisdiction is proper.

The Constitutional Challenge

Fairfax also pressed upon this court the holding of *Glen Ridge I Condominiums, Ltd. v. FSLIC*, No. 05-85-00873-CV, slip op. (Tex. Ct. App. December 30, 1986). In that case the court, relying upon *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), held that Congress had violated Article III in precluding judicial determination of creditor claims. The 9th Circuit, in *CHG*, also expressed its belief that if Congress had relegated such disputes to administrative procedure there were serious Article III implications.

The general rule is that no court should pass on the constitutionality of a federal statute if the case may be disposed of on other grounds. Here there may be other grounds as administrative proceedings have not been completed. However, both parties have, before this court, presented and briefed the constitutional issue. Because they have done so, this court will proceed to determine it.

In *Northern Pipeline* the Court held that final adjudicatory power granted bankruptcy courts by Congress violated Article III. In so holding the Court was troubled by the extensive powers given bankruptcy courts. The Court found that the contract dispute in that case was a private right and thus relegated to Article III courts. The private rights doctrine allows delegation of adjudicatory power to non Article III courts only when a public right is implicated. Public rights arise "between the Government and persons subject to its authority in connection with the performance of the constitutional function of the executive or legislative departments." *Northern Pipeline*, 458 U.S. at 65-66. A public right is not a liability of one individual to another.

The Court further held that "[W]hen Congress creates a statutory right, it clearly has the discretion . . . to provide that persons seeking to vindicate that right must do

so before particularized tribunals created to perform the specialized adjudicative tasks related to that right." *Id.* at 83. And, in *Thomas v. Union Carbide Agricultural Products*, 473 U.S. ——, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985), the Court stated that Congress may grant jurisdiction to a non-Article III body over disputes so closely integrated into a public regulatory scheme as to be a matter appropriate for agency determination with limited judicial involvement (review only) when the rights created seem private.

Finally, in *Commodity Futures Trading Commission v. Schor*, 478 U.S. ——, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986), the Court held that a "private right" counterclaim could be heard by a non-article III tribunal. 92 L.Ed.2d at 686. It held there are three factors to be weighed to determine whether an administrative determination violates Article III. They are: 1) the extent to which the 'essential attributes of judicial power' are reserved to Article III courts and, conversely, the extent to which the non Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, 2) the origin and importance of the rights being adjudicated, and 3) the concerns that drove Congress to depart from Article III.

In applying the foregoing cases to the case at bar it is first noted that the power of the FSLIC and the FHLBB is not nearly as broad as the power of the bankruptcy court which so troubled the court in *Northern Pipeline*. Additionally, Fairfax would have no dispute with anyone but Audubon were it not for the congressional creation of FSLIC and the legislative creation of its standing as a party. Thus this entire action can and should be construed as a public right (*Northern Pipeline*) or at least one so closely integrated into a public regulatory scheme (*Union Carbide*) to be appropriate for agency determination. Further, in applying the *Commodity Futures* factors one finds that the FSLIC does not have powers akin to

those of Article III courts and that any forthcoming determination of it is reviewable by an Article III court, the original of any right Fairfax has to proceed against the FSLIC is statutory, and Congress wanted to facilitate prompt liquidation because delay can wreck havoc upon depositors.

As FSLIC points out, at least four federal court decisions have held that the determination of a state law claim by FSLIC as receiver does not violate Article III of the Constitution. *Baer v. Abel*, 637 F.Supp. 347 (W.D. Wash. 1986); *First Amer. Sav. Bank v. Westside Federal Sav.*, 639 F.Supp. 93 (W.D. Wash. 1986); *Lyons Sav. & Loan Ass'n v. Westside Bankcorp.*, 636 F.Supp. 576 (N.D. Ill, 1986); and *Rembold v. Gibralter Savings & Loan Ass'n*, 624 F.Supp. 1006 (W.D. Wash. 1985), overturned on other grounds No. 86-3658 (9th Cir. Feb. 25, 1987).

This court concludes the statutory scheme presented here is constitutional.

Order will be entered denying the motion for reconsideration.

DATED this 7 day of April, 1987.

/s/ Winston E. Arnow
WINSTON E. ARNOW
Senior Judge

MOTION FILED
JUN 17 1988

No. 87-996

In the Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRSTSOUTH, F.A.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF THE FEDERAL HOME LOAN BANK OF DALLAS, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, AND FEDERAL HOME LOAN BANK OF TOPEKA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE SUPPORTING AFFIRMANCE

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MOTION OF THE FEDERAL HOME LOAN BANK OF DALLAS, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, AND FEDERAL HOME LOAN BANK OF TOPEKA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 36 of the Rules of this Court, amici curiae Federal Home Loan Bank of Dallas, Federal Home Loan Bank of San Francisco, and Federal Home Loan Bank of Topeka request leave to file the accompanying brief as amici curiae in support of affirmance of the court of appeals' judgment. Counsel for respondent has consented to the filing of this brief; however, ~~we have been unable to reach~~ counsel for petitioner ~~to obtain his consent.~~ has refused consent.

Amici curiae are three of the twelve regional Federal Home Loan Banks (District Banks). Each District Bank is a federal instrumentality organized in the form of a corporation. All of the stock of each District Bank is owned by its members, which consist predominantly of federally-insured savings and loan institutions. 12 U.S.C. 1424, 1426. The primary function of the District Banks

is to make advances (loans) to their member institutions to assist those institutions in making home mortgage loans. 12 U.S.C. 1430. As of December 31, 1987, the three amici District Banks had outstanding advances to members in excess of $50 billion.

Member institutions within the three Districts represented by amici have experienced a disproportionate number of insolvencies in recent years. Each District Bank is typically the second largest creditor (behind only the Federal Savings and Loan Insurance Corporation itself) of such failed institutions. In addition, Congress recently has required the District Banks to contribute heavily to the recapitalization of the FSLIC insurance fund. See Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 302, 101 Stat. 552, 587. Thus, amici have a vital interest in the integrity of the federal deposit insurance system, as well as the health of the savings and loan industry generally and federally-insured institutions in particular. The expeditious and orderly resolution of FSLIC receiverships established to conduct the liquidation of failed institutions is of paramount importance to the protection of these interests.

For the foregoing reasons, the motion of the Federal Home Loan Bank of Dallas, the Federal Home Loan Bank of San Francisco, and the Federal Home Loan Bank of Topeka to file the accompanying brief as amici curiae in support of affirmance should be granted.

Respectfully submitted.

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QUESTIONS PRESENTED

1. Whether claims against the assets of an insolvent, federally-insured savings and loan association must be presented in the first instance in federal receivership proceedings in accordance with the Federal Home Loan Bank Board's regulations for the administrative resolution of such claims.

2. Whether requiring creditors of insolvent, federally-insured savings and loan associations to exhaust their administrative remedies under the Band Board's regulations prior to seeking judicial review under the Administrative Procedure Act violates Article III of the Constitution, the Due Process Clause of the Fifth Amendment, or the Seventh Amendment right to trial by jury.

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BRIEF FOR THE FEDERAL HOME LOAN BANK OF DALLAS, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, AND FEDERAL HOME LOAN BANK OF TOPEKA AS AMICI CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE AMICI CURIAE

The interest of the amici curiae is described in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

1. a. The court of appeals correctly concluded that the Federal Savings and Loan Insurance Corporation has exclusive authority to adjudicate claims against failed savings and loan institutions in the first instance. Congress has directed FSLIC to liquidate insolvent S&Ls "in an orderly manner" (12 U.S.C. 1729(b)(1)(A)(v)) and to "pay all valid credit obligations" (12 U.S.C. 1729 (b)(1)(B)), while at the same time prohibiting any judicial proceedings that would "restrain or affect" FSLIC's performance of these functions as receiver. 12 U.S.C. 1464(d)(6)(C). Without question, permitting courts across the country to adjudicate claims in the first instance would significantly delay the liquidation of failed S&Ls, add considerable expense to the cost of liquidation, and present the Federal Home Loan Bank Board and FSLIC with the danger of inconsistent judgments concerning the *same* receivership assets. These results are plainly incompatible with Congress's intent that liquidations be conducted expeditiously and in an orderly manner.

b. This reading of the governing statutes is supported by long-standing administrative interpretation. For over 30 years, the Bank Board's regulations have instructed FSLIC to allow or disallow claims, powers that this Court has held are synonymous with adjudication. *Katchen* v. *Landy*, 382 U.S. 323, 329 (1966). Congress has never disturbed the Bank Board's interpretation of

FSLIC's adjudicatory authority. That interpretation of the expert agency is therefore entitled to great weight.

c. Congress's recent amendment to the Federal Credit Union Act also reinforces the Bank Board's interpretation of FSLIC's governing statutes. Congress gave the National Credit Union Administration Board the same freedom from judicial restraint of its receivership powers that FSLIC has enjoyed for decades. The Senate Report stated unequivocally that the amendment was designed to clarify the NCUAB's authority to adjudicate claims, subject only to judicial review under the Administrative Procedure Act. S. Rep. No. 19, 100th Cong., 1st Sess. 25 (1987). This confirms that FSLIC's identically-worded statutory authority should be interpreted in the same manner.

2. Coit's constitutional challenges to FSLIC's and the Bank Board's exclusive adjudicatory authority are not ripe, because Coit has not yet exhausted its administrative remedies. Even if those challenges were properly before the Court, however, they are without merit.

a. Article III of the Constitution is not violated by according FSLIC exclusive authority to adjudicate claims, subject to Bank Board and judicial review. See *CFTC* v. *Schor*, 106 S.Ct. 3245, 3258 (1986). First, Congress has reserved all of the essential attributes of judicial power to Article III courts. Second, Congress empowered FSLIC to adjudiciate only claims against assets of insolvent S&Ls that are in its possession. Because adjudication of such claims is essential to the "restructuring of debtor-creditor relations," the claims are of the kind that Congress permissibly may delegate to an agency for initial adjudication. See *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion). Finally, Congress had compelling reasons that fully justify its decision to centralize claims against the assets of failed S&Ls in a single administrative forum.

b. Nor does FSLIC's adjudication of claims per se violate due process. Congress has mandated that FSLIC

pay all valid claims to the extent of available assets and treat all claimants fairly. FSLIC, like any agency, is entitled to a presumption that it will act according to its statutory mandate. Furthermore, Bank Board and judicial review provide adequate safeguards against possible due process violations in a particular case.

c. Finally, the Seventh Amendment does not bar otherwise valid delegations of adjudicatory authority to administrative agencies. See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 460 (1977). Therefore, if FSLIC's exclusive authority to adjudicate claims in the first instance comports with Article III and due process, Coit's Seventh Amendment challenge adds nothing to its argument. In any event, the claims FSLIC adjudicates, like the claims adjudicated by bankruptcy referees under the Bankruptcy Act of 1898, are equitable in nature and thus are not subject to the Seventh Amendment's jury trial right.

ARGUMENT

This case comes to the Court at a time when the savings and loan industry is in the midst of its worst financial crisis since the Great Depression. Currently, FSLIC is serving as receiver for over 60 S&Ls that the Bank Board has found to be insolvent. As a consequence, FSLIC's insurance fund is under the most severe pressures it has ever faced. The General Accounting Office recently determined that the fund was insolvent by more than $13.7 billion. See *Hearings Before the Sen. Comm. on Banking, Housing & Urban Affairs*, 100th Cong., 2d Sess. (May 19, 1988) (statement of Frederick D. Wolf). Because of the extraordinary number of S&L insolvencies in recent years, FSLIC's reserves have been insufficient to permit it to close any but the weakest institutions. See Barth, Brumbaugh, Sauerhaft & Wang, *Insolvency and Risk-Taking in the Thrift Industry: Implications for the Future*, 3 Contemp. Policy Issues 1, 4-6, 15 (Fall 1985).

Congress gave the Bank Board exceptionally broad power to issue regulations governing the conduct of re-

ceiverships. As this Court stated in regard to the Board's similarly worded power to regulate ongoing S&Ls, "[n]owhere [in the legislative history] is there a suggestion of any intent somehow to limit the Board's authority." *Fidelity Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 164 (1982). Pursuant to this broad grant of authority, the Bank Board has set forth comprehensive procedures for the administrative determination of claims against insolvent S&Ls.

These procedures provide the regulators of the S&L industry with an essential tool—the ability to conduct liquidation proceedings in an orderly and expeditious manner by consolidating all creditor claims against an insolvent S&L in a single forum for initial resolution. Without this tool, FSLIC would incur greatly added expense in liquidating insolvent S&Ls, would suffer substantial delays between the time it paid insurance to the S&L's depositors and the time it could recover the depositors' claims against the S&L to which it has become subrogated, and would have no reasonable expectation of receiving interest on the money it had lost in the interim.

Accordingly, we fully endorse the Solicitor General's argument that these procedures validly create a mandatory exhaustion requirement. In addition, we believe that Coit's challenge to the standard of judicial review of the denial of a creditor's claim is not ripe, because Coit's claim has not yet been acted on administratively and may ultimately be resolved without the need for judicial proceedings. In the event that the Court reaches the standard of review issue, however, we submit that the power of FSLIC and the Bank Board is not limited to deciding merely whether to contest payment of a creditor's claim. On the contrary, we endorse the Bank Board's longstanding interpretation of its statutes and regulations as authorizing FSLIC to determine in the first instance claims against an insolvent S&L for which it is serving as receiver. Those determinations are subject to review by the Bank Board and, ultimately, by the federal district courts acting pursuant to the Administrative Procedure Act.

I. FSLIC HAS EXCLUSIVE AUTHORITY TO ADJUDICATE IN THE FIRST INSTANCE CLAIMS AGAINST AN INSURED S&L FOR WHICH IT IS SERVING AS RECEIVER

A. FSLIC's Assertion Of Exclusive Authority To Adjudicate Claims In The First Instance Is Consistent With Principles Of Statutory Construction.

1. *The language of the savings and loan statutes makes clear that Congress intended FSLIC to have exclusive authority to adjudicate claims in the first instance.*

During the past 50 years, Congress has enacted a number of statutes expressly designed to empower the Bank Board and FSLIC to oversee the affairs of federally-insured savings and loan associations. When these statutes are read as a whole, it becomes plain that Congress gave FSLIC the authority to adjudicate in the first instance claims against an insured S&L for which it is serving as receiver.[1]

To begin with, the National Housing Act instructs FSLIC to undertake liquidations "in an orderly manner," 12 U.S.C. 1729(b)(1)(A)(v), 1729(c)(3)(B), and, to the extent money is available, to "pay all valid credit obligations of [the S&L being liquidated]." 12 U.S.C. 1729(b)(1)(B), 1729(c)(1)(A), 1729(c)(1)(B)(i)(II). To carry out this mandate, the NHA gives FSLIC the power "to settle, compromise, or release claims in favor

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[1] Throughout this brief, when we refer to FSLIC's authority to adjudicate claims, we are referring to FSLIC's authority to allow or disallow claims *subject to review by the Bank Board*. Although FSLIC is empowered to determine the validity of claims, its determinations are accorded no deference on administrative review. FSLIC's determinations become the final decision of the agency only if there is no request for review or if the Bank Board adopts those determinations.

of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board * * *." 12 U.S.C. 1729(d). Meanwhile, the Home Owners' Loan Act gives the Bank Board broad authority "to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of [insolvent S&Ls] * * * and for the conduct of conservatorships and receiverships * * *." 12 U.S.C. 1464(d)(11). Finally, to further assist FSLIC in performing liquidations in an orderly manner and in paying all valid credit obligations to the extent of available assets, the HOLA provides that "no court may * * *, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver." 12 U.S.C. 1464(d)(6)(C).

Thus, Congress has expressly prohibited court interference with FSLIC's statutory duties to liquidate S&Ls in an orderly manner and to pay all valid credit obligations. As we show below, court jurisdiction to conduct *de novo* adjudication of claims would interfere with these duties and therefore is barred by statute.

First, permitting courts to make *de novo* determinations of claims would engender significant delay in winding up the affairs of an S&L in receivership. Judicial adjudication of claims entails different statutes of limitations for different claims. Most of these statutes provide substantially greater time for filing a claim than do the Bank Board's regulations, which permit the Board to set a deadline as short as 90 days from the date of the notice to the potential claimants. 12 C.F.R. 549.4(a), 549.5-1(b)(1), 569a.8(a). Furthermore, the calendars of many courts in this country are extremely overburdened, resulting in significantly delayed trial dates. See, *e.g.*, *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (recognizing "today's crowded dockets"). Finally, because most courts are courts of general jurisdiction, they may have less experience than FSLIC and the Bank Board in deciding the types of legal or factual

disputes that are common to claims against S&Ls. FSLIC and the Bank Board have special expertise as to the vast majority of contested claims against receivership assets. These claims tend to involve loans, real estate transactions, and securities law issues that are heavily regulated by the Bank Board, see, *e.g.*, 12 C.F.R. 545.32-545.53, 563.9-3 (regulating loan practices); 12 C.F.R. 563.9-8 (regulating real estate transactions); 12 C.F.R. 563.5, 563.7-2, 563.7-4, 563.7-5, 563.8-1, 563.13-2, Pts. 563d, 563g (regulating issuance of securities), and that FSLIC and the Board have repeatedly adjudicated over the history of FSLIC receiverships.

As a result, judicial adjudication of creditors' claims through trial and appeal would take significantly longer than the administrative process. And because FSLIC as receiver generally cannot fix the time and manner of distribution of assets until it knows which claims are valid,[2] permitting judicial adjudication in the first instance would result in delay in the distribution of assets to all creditors, not just those who take the judicial route. Such delay runs contrary to Congress's intent that FSLIC

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[2] Coit argues (Br. 21 n.18) that FSLIC has the option of undertaking a preliminary distribution, reserving funds for claims that have not yet emerged from the judicial forum. Theoretically, this is true. In practice, however, the dollar amount of claims against the receivership estate for which FSLIC would need to reserve often would be so large that preliminary distributions would of necessity be quite small. Furthermore, to make even small distributions, FSLIC likely would need to wait until a substantial percentage of claims have been resolved in the judicial arena.

Similarly, Coit suggests (Br. 20-21) that FSLIC can avoid delayed payment of creditors' claims by using purchase and assumption transactions rather than liquidating receiverships. For federal associations like FirstSouth, as well as for many state-chartered institutions, this approach essentially makes all creditors whole at the expense of the FSLIC insurance fund. Under such an approach, the cost to FSLIC of entering into a purchase and assumption agreement would far exceed the cost of liquidating the institution. As such, the Bank Board is required by law to eschew a purchase and assumption in favor of liquidation. See 12 U.S.C. 1729(f)(4)(A).

"be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution." *North Mississippi Savings & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096, 1101 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986). Indeed, in recently giving the National Credit Union Administration Board exclusive power to adjudicate claims against insolvent credit unions, Congress reiterated this intent, stating that expeditious liquidations are necessary "to achieve minimal disruption to the financial system." S. Rep. No. 19, 100th Cong., 1st Sess. 25 (1987).

In light of Congress's intent that FSLIC accomplish liquidations expeditiously, *de novo* judicial adjudication of claims unquestionably would "restrain or affect" (12 U.S.C. 1464(d)(6)(C)) the exercise of FSLIC's functions as receiver. As the Fifth Circuit has recognized (*Hudspeth*, 756 F.2d at 1102):

> [R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: the FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as receiver, such a delay is a "restraint" within the scope of the statute.

Coit's only response to this concern is the assertion (Br. 21-22) that the administrative process followed by APA review actually will take *longer* than judicial adjudication in the first instance. But this suggestion is belied both by the considerations mentioned above and by FSLIC's own experience. FSLIC's experience demonstrates that only a small percentage of all claims filed eventually reach the federal courts, because many claimants are satisfied by the administrative resolution of their claims. Moreover, the issue in the relatively few cases that do reach the courts is limited to whether the Bank Board's decision was arbitrary, capricious, or not supported by substantial evidence. See 5 U.S.C. 706.

These cases are determined on the basis of the administrative record. There is no need for discovery, evidentiary hearings, trial, or other time-consuming activities associated with *de novo* judicial proceedings.

Second, *de novo* judicial adjudication of claims imposes a far greater drain on receivership assets than does administrative adjudication followed by APA review. The administrative process is far less formal than the judicial process and therefore is less costly. Additionally, the expertise of the Bank Board makes resolution of claims by the Board simpler and less expensive than resolution by the courts.

Because, in the distribution of the S&L's assets, FSLIC's litigation expenses have priority over creditors' claims, the extent of FSLIC's litigation expenses has a direct bearing on the amount of money FSLIC ultimately is able to disburse to creditors. The greater FSLIC's expenses, the greater the likelihood that FSLIC will not be able to pay valid creditors who are low on the list of priorities. Similarly, the greater FSLIC's expenses, the smaller the pro rata share of creditors whom FSLIC is able to pay. In short, any process that significantly increases FSLIC's litigation expenses significantly interferes with its duty to "pay all valid credit obligations" (12 U.S.C. 1729(b)(1)(B)).

Furthermore, the added expense of *de novo* judicial adjudication of claims could force FSLIC to allow questionable claims merely because the cost of litigating them might be greater than the expected pro rata payout. That result can hardly constitute liquidation "in an orderly manner" (12 U.S.C. 1729(b)(1)(A)(v)) and, because it reduces the pro rata shares of valid claimants, it again conflicts with FSLIC's duty to "pay all valid credit obligations" (12 U.S.C. 1729(b)(1)(B)).

Third, judicial adjudication of claims in the first instance poses a real danger that courts will render inconsistent judgments with respect to the *same* receivership assets. For example, numerous failed institutions have been involved as participants in massive construc-

tion projects around the country. Each of the other participants in these projects (*e.g.*, contractors, developers, and other lenders) might have a claim against the receivership. If each participant pursued its remedies in a different court, FSLIC could be subjected to inconsistent judgments concerning the property that secured the participation interests. Once more, this outcome is squarely at odds with any notion of orderly liquidation.

Fourth, permitting *de novo* court adjudication requires subjecting FSLIC as receiver to different rules in each of the several forums in which claims might be brought. This eventuality frustrates the goal of orderly liquidation and raises the specter of forum-shopping. Claimants who can afford to shop for favorable forums will be advantaged vis-a-vis other claimants. This is inconsistent with the duty to treat similarly situated claimants equally, which is inherent in the duty to pay all valid credit obligations to the extent of available assets.

Congress intentionally gave the Bank Board broad authority to regulate the liquidation of insolvent S&Ls. In commenting on the Bank Board's similarly-worded authority to regulate ongoing S&Ls, this Court observed that "'[i]t would have been difficult for Congress to give the Bank Board a broader mandate.'" *de la Cuesta*, 458 U.S. at 161 (quoting *Glendale Federal Savings & Loan Ass'n v. Fox*, 459 F. Supp. 903, 910 (C.D. Cal. 1978)). The Court further explained that HOLA's legislative history "confirm[s] our reading of the statutory language and the Board's plenary authority to regulate the operations of federal savings and loans. * * * *Nowhere is there a suggestion of any intent somehow to limit the Board's authority.*" *Id.* at 163-164 (emphasis added). As with the Board's power to regulate ongoing S&Ls, Congress gave absolutely no indication of an intent implicitly to limit the Board's power to regulate liquidation of failed S&Ls. Indeed, by specifically *excluding* S&Ls from the provisions of the Bankruptcy Code, see 11 U.S.C. 109(b)(2), Congress placed all hope for coherent liquidation of S&Ls in the Bank Board's hands.

In sum, when the exclusion from the Bankruptcy Code is read in light of the broad language authorizing the Bank Board's receivership powers, the conclusion is manifest that "it would have been difficult for Congress to give the Bank Board a broader mandate." And given the delay, expense, and inconsistency inherent in court adjudication of claims against failed S&Ls, it is inconceivable that Congress's grants of authority to FSLIC and the Bank Board, and its proscription against court interference with the functions of FSLIC as receiver, can mean anything other than that FSLIC and the Board have exclusive authority to adjudicate such claims in the first instance.

2. *The Bank Board's long-standing regulations giving FSLIC exclusive authority to adjudicate claims in the first instance constitute a reasonable interpretation of the S&L statutes.*

FSLIC's authority to resolve claims against S&Ls in receivership rests on more than just the language of the Bank Board's various statutes. Congress gave the Bank Board authority to issue regulations for the conduct of receiverships for federal S&Ls in 1933 and clarified that power in 1966. Financial Institution Supervisory Act of 1966, Pub. L. No. 89-965, § 101(a), 80 Stat. 1028 (codified as amended at 12 U.S.C. 1464(d)(11)). For more than 30 years, the Bank Board's administrative regulations have construed the statutory scheme as giving FSLIC exclusive authority to adjudicate claims in the first instance.

The Bank Board published its receivership regulations for federal associations in 1956. Those regulations remain essentially unchanged today. Among other things, they provide that (12 C.F.R. 549.4(b) (emphasis added)):

> The receiver shall allow any claim seasonably received and *proved to its satisfaction.* The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor. * * * Unless, within 30 days after notice is mailed, the claimant files a written request for payment regardless of the dis-

allowance, disallowance shall be final, except as the Board may otherwise determine.

This Court has interpreted similar language in the old Bankruptcy Act as constituting authorization to adjudicate claims. That Act empowered bankruptcy courts to "[a]llow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates." Bankruptcy Act of 1898, § 2(a)(2) (formerly codified at 11 U.S.C. 11(a)(2)) (repealed 1978). The Court held that the bankruptcy courts' authority included the "full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or a claim against the estate is based,'" and it noted that the process of proof, allowance, and distribution constitutes "'adjudication.'" *Katchen* v. *Landy*, 382 U.S. 323, 329 (1966) (citations omitted).

Thus, the Bank Board's regulations, which use language similar to that of the old Bankruptcy Act, make it clear that FSLIC is to adjudicate claims in the first instance, subject to review by the Bank Board. As the Seventh Circuit recently noted, "Congress has made several amendments to the statutory framework over the course of the past thirty years, but has never limited the FSLIC's authority to adjudicate claims." *Lyons Savings & Loan Ass'n* v *Westside Bancorporation*, 828 F.2d 387, 392 (1987) (citations omitted). Indeed, in 1966 Congress clarified the Bank Board's rulemaking authority, eliminating any doubt that the Board has power to issue regulations governing the conduct of liquidating receiverships. See 12 U.S.C. 1464(d)(11). Consequently, the Bank Board's long-standing interpretation of Section 1729(d), undisturbed, and implicitly acquiesced in, by Congress, is entitled to great weight, and should not be disregarded unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984).[3]

[3] Amicus United States League of Savings Institutions (League) contends (League Am. Br. 23-26) that until the 1980s FSLIC and the Bank Board had never asserted that FSLIC has exclusive authority to adjudicate claims in the first instance and suggests, therefore, that the position of FSLIC and the Board is neither consistent nor long-standing. The League's argument is incorrect. The Board and FSLIC have *always* taken the position that FSLIC has exclusive authority to adjudicate claims. Because very few federally chartered S&Ls were liquidated prior to the 1980s, however, FSLIC had only occasional opportunity to assert this position in court. But when the issue has arisen, FSLIC has taken the same position that we advance in this brief. See, *e.g.*, *Community Fed. Savings & Loan Ass'n* v. *Fields*, 128 F.2d 705, 706 (8th Cir. 1942).

The Bank Board's receivership regulations are not arbitrary; nor are they "manifestly contrary to the statute." Rather, they are fully in accord with the language and purposes of the Bank Board's statutes. As shown above, permitting court adjudication in the first instance would engender additional expense, delay, and inconsistency in the resolution of claims against the receivership estate. These results can serve only to damage public confidence in FSLIC and the S&L industry. See S. Rep. No. 1263, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2540 ("Timely insurance payouts are vital * * * to preserve the confidence of the public at large in the safety and stability of savings and loan associations in general.").

3. *The history of banking receiverships supports the view that the S&L statutes and regulations accord FSLIC exclusive authority to adjudicate claims in the first instance.*

Still further support for the Bank Board's interpretation of its statutes and regulations is provided by the history of banking receiverships as of the time Congress enacted 12 U.S.C. 1729(d). Originally, banking institutions in default were liquidated pursuant to court-appointed receiverships. In these "equity receiverships," the receiver was a court officer who acted as an agent of the court that appointed him, and the court itself was responsible for the administration of the estate. See *Porter* v. *Sabin*, 149 U.S. 473, 478 (1893); R. Clark,

Law of Receivers § 11, at 13-14 (3d ed. 1959). All of the equity receiver's actions, including determination of claims, were subject to review in the appointing court.

Because of the need for constant court supervision, "the process of liquidation of insolvent banks through the instrumentalities of the courts had been extended over many years, engendering public complaint and criticism." *Abbott* v. *Morris*, 101 W. Va. 127, 133, 132 S.E. 372, 374 (1926); see also Note, *The Appointment of Receivers for National Banks*, 44 Harv. L. Rev. 618, 618 (1931) ("In the case of banks procedural difficulties make judicial handling of liquidation and reorganization particularly difficult."). The states came to recognize "that the urgent and delicate issues involved in a bank closure, affecting as they do not only large sums of money, but the credit and assets of its depositors, both large and small, are all matters which are ill suited for lengthy court hearings." *State ex rel. Arnold* v. *Egnor*, 275 S.E. 2d 15, 21 (W. Va. 1981). As a consequence, many states replaced court receiverships with statutory bank receiverships.

In a statutory receivership, the legislature determines if, when, and under what circumstances decisions made by the receiver may be subject to court review. See *Wm. Filene's Sons Co.* v. *Weed*, 245 U.S. 597, 602 (1918) ("When a statutory [receivership] system is administered the only question for the Courts is what the statutes prescribe."); *Hulse* v. *Argetsinger*, 18 F.2d 944, 945-946 (2d Cir. 1927) (L. Hand, J.) (national bank receiver appointed by the Comptroller of the Treasury pursuant to the National Bank Act is not subject to the court's supervision, except as the National Bank Act prescribes); 9 C. Zollman, *The Law of Banks and Banking* § 6101, at 216 (1936) (statutory receiver is "subject only to the judgment of [equity] courts as the Legislature itself may have provided for").

By the time Congress created FSLIC in 1934, 21 states and the District of Columbia had enacted purely statutory

liquidation schemes for insolvent building and loan associations. Note, *Statutory Control over the Dissolution of Building and Loan Associations*, 35 Colum. L. Rev. 265, 267 n.20 (1935).[4] It was in this climate of rejection of the role of courts in the receivership process that Congress provided for FSLIC's receivership function. In so doing, Congress did *not* provide for judicial determination of claims in the first instance.[5] In light of the history of banking receiverships and the general rule restricting judicial control over a statutory receiver absent express legislative consent, it is reasonable to interpret the NHA and the HOLA as according FSLIC a similar power to adjudicate claims in the first instance. See C. Sutherland, *Statutory Construction* § 49.01, at 347 (4th ed. 1984) ("Statutes are documents having practical

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[4] Another six states provided for judicial appointment of receivers, but gave those receivers a level of freedom from court interference similar to that of purely statutory receivers. Note, 35 Colum. L. Rev. at 267 n.21.

[5] Because Coit and Amicus League do not recognize the distinction between statutory and equity receiverships, they incorrectly rely upon *Riehle* v. *Margolies*, 279 U.S. 218 (1929), *Morris* v. *Jones*, 329 U.S. 545 (1947), and *Grant* v. *Buckner*, 172 U.S. 232 (1898), for the proposition that adjudication of claims is not a receivership function. These cases all involved equity receiverships and therefore are inapposite. (Moreover, because no statutes were involved, there were no provisions analogous to 12 U.S.C. 1464(d)(6)(C) and 1729(d), preventing initial judicial adjudication.)

This lack of understanding of the difference between statutory and equity receiverships also plagues the League's attempt (Br. 20-21) to contrast FSLIC's receivership powers with its powers to supervise ongoing S&Ls. The League points out that Congress provided FSLIC with detailed statutory guidance for the exercise of FSLIC's supervisory functions but did not do so with respect to FSLIC's receivership capacity. The League infers from this that Congress did not intend "to establish an exclusively administrative claims determination procedure." What the League fails to appreciate, however, is that Congress did not need explicitly to divest courts of power to adjudicate in the first instance claims against failed S&Ls. In statutory receivership schemes, including the one Congress established for S&Ls, courts have *no* role that is not assigned to them by the legislature. See page 14, *supra*.

effects. It is therefore improper to construe them in the abstract, without taking into consideration the historical framework in which they exist.").

4. ***The language of other federal banking statutes confirms that the S&L statutes grant FSLIC exclusive authority to adjudicate claims in the first instance.***

Other banking statutes enacted by Congress bolster this interpretation. For example, Congress recently amended the Federal Credit Union Act to add language virtually identical to that of 12 U.S.C. 1464(d)(6)(C):

> Except as otherwise provided in this subparagraph, no court may take any action for or toward the removal of any liquidating agent or, except at the instance of the [National Credit Union Administration] Board, restrain or affect the exercise of powers or functions of a liquidating agent.

Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 714(a), 101 Stat. 552, 654 (to be codified at 12 U.S.C. 1787(a)(1)(B)). In addition, Congress amended its description of the NCUAB's liquidation functions, which have always tracked FSLIC's, to parallel Section 1729(d) exactly:

> In connection with the liquidation of any insured credit union, the Board shall have the power to carry on the business of and collect all obligations to the credit union, to settle, compromise, or release claims in favor of or against the credit union, and to do all other things that may be necessary therewith, subject only to the regulation of the Board, or, in cases where the Board has been appointed liquidating agent solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

12 U.S.C. 1788(c), as modified by Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 714(b), 101 Stat. 552, 655 (to be codified at 12 U.S.C. 1787(j)).

Congress stated in unequivocal terms its purpose for giving the NCUAB liquidation powers essentially identical to those of FSLIC:

> The Committee expects that liquidations conducted under this section *shall be accomplished as expeditiously as possible in order to achieve minimal disruption to the financial system.* Creditor, member and other claimants must be dealt with in a fair manner. These amendments clarify the [National Credit Union Administration Board's] authority to *adjudicate* liquidation claims. *Upon final agency action, a claimant may seek recourse in court under the provisions of the Administrative Procedure Act.*

S. Rep. No. 19, 100th Cong., 1st Sess. 25 (1987) (emphasis added). Obviously, Congress believed that FSLIC's powers, which it used as a template for NCUAB's powers, include the exclusive authority to adjudicate claims in the first instance, and it also evidently believed that such powers are essential to resolve creditor claims expeditiously, in order to avoid "disruption to the financial system."

It is instructive as well that the National Bank Act explicitly gives creditors the option of presenting their claims for administrative determination *or* seeking adjudication in a court of competent jurisdiction. See 12 U.S.C. 194. This statute was in existence when the S&L statutes were enacted. Indeed, Congress used it as a model for much of the S&L legislation. See, *e.g.*, H.R. Rep. No. 1922, 73d Cong., 2d Sess. 4 (1934). Yet Congress did not provide explicitly for judicial adjudication of claims in the S&L context as it had in the national bank context. Furthermore, unlike in the national bank context, Congress gave the S&L receiver power to settle or release claims subject only to regulation by the Bank Board. These deviations from the national bank model provide yet another strong indication that Congress intended FSLIC's adjudicative role to be exclusive. See *Wheeler* v. *Greene*, 280 U.S. 49, 51 (1929) ("When so important a grant of power contained in the prototype

is left out from the copy it is almost impossible to attribute the omission to anything but design, or to believe that it left to very attenuated implications what the model before it so clearly expressed."). Coit's reliance (Br. 28-29) on the FDIC's lack of adjudicative authority is therefore misguided.

B. The Arguments Of Coit And Its Amici Do Not Detract From The Conclusion That Congress Gave FSLIC Exclusive Authority To Adjudicate Claims In The First Instance.

Coit and its amici offer little reason to disagree with FSLIC's reading of 12 U.S.C. 1464(d)(6)(C) and 1729(d) and the Bank Board's implementing regulations. Coit's principal attack on FSLIC's reading of the statutes focuses upon 12 U.S.C. 1464(d)(6)(C). Specifically, Coit argues (Br. 12) that that section can be construed in only two ways: the provision either does not bar courts from adjudicating claims in the first instance or bars *any* role for the courts, including that of reviewing administrative determinations under the APA. Thus, in Coit's view, the Fifth Circuit's decision in *Hudspeth* is "internally inconsistent." It is Coit's "all or nothing" argument, however, that is wholly inconsistent and illogical. Absent specific congressional direction, there is a strong presumption that agency action is subject to judicial review. See *Traynor* v. *Turnage*, 108 S.Ct. 1372, 1378 (1988); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). Accordingly, it is hardly "internally inconsistent" to conclude that Congress meant to prohibit judicial determination of claims in the first instance, because such adjudications would have the greatest tendency to "restrain or affect" the receiver, but not to disturb the courts' long-standing jurisdiction to review *final* agency determinations under the APA.

Perhaps recognizing the futility of arguing that Sections 1464(d)(6)(C) and 1729(d) and the Board's regulations do not give FSLIC exclusive adjudicatory authority, Coit and its amici quickly turn to other statutory provisions that are unrelated to the processing of claims

against receiverships. These insubstantial arguments merely demonstrate Coit's failure to comprehend the distinction between FSLIC's corporate and receivership capacities. For example, Coit cites (Br. 26-27) FSLIC's power to "sue and be sued," 12 U.S.C. 1725(c)(4), and infers from this that Congress viewed FSLIC more as a potential litigant than as an adjudicator. It is plain from the face of this provision, however, that the "sue and be sued" authority refers to FSLIC's corporate capacity, as distinct from its receivership capacity.

Similarly, Coit relies on the NHA's three-year limitation on depositor actions against FSLIC. 12 U.S.C. 1728(c). It argues that this provision anticipates that FSLIC will be required to defend depositor suits in court and that therefore Congress also must have envisioned that FSLIC will defend creditor suits in court. This argument again misses the crucial distinction between FSLIC's corporate and receivership capacities. FSLIC makes insurance coverage determinations in its corporate capacity, see 12 C.F.R. 564.1, not its receivership capacity. Section 1464(d)(6)(C)'s prohibition against restraints on receivership functions does not apply to FSLIC's corporate capacity and therefore does not apply to deposit insurance disputes. Thus, contrary to Coit's suggestion, it is perfectly logical to interpret the explicit limitation of Section 1728(c) to *depositor* suits, and the absence of any statute of limitations expressly governing *creditor* suits, as indicating that Congress did *not* anticipate that FSLIC would be sued in its receivership capacity.

Coit bases its next argument on 12 U.S.C. 1730(k)(1). This provision grants the federal district courts jurisdiction over lawsuits to which FSLIC is a party, subject to the proviso that when FSLIC is conservator, receiver, or legal custodian for a state-chartered S&L and the lawsuit involves only state-law rights of investors, creditors, stockholders, or the S&L, the relevant state court has jurisdiction. Coit contends (Br. 27) that this proviso, "which was intended to keep certain actions in state

courts, indicates what type of suits Congress expected FSLIC to defend against in state courts," and, by implication, the type of suits Congress intended FSLIC to defend in federal court. Contrary to Coit's suggestion, however, Section 1730(k)(1) is not an independent grant of jurisdiction over claims that have long been withheld from the judicial process. Rather, it merely accomplishes with respect to state-supervised receiverships what Section 1464(d)(6)(C) accomplishes with respect to Bank Board-supervised receiverships: ensuring that claims are centralized in the forum responsible for overseeing the receiver.

Finally, both Coit (Br. 29 n.23) and amici Watson *et al.* (Watson Am. Br. 8-10) argue that because FSLIC must bring claims on behalf of insured S&Ls in court, requiring claims against insured S&Ls to be brought in the administrative forum raises the possibility that a single controversy arising out of the same set of operative facts will be subject to simultaneous proceedings in two forums. They argue that this hypothetical situation, which neither Coit nor Watson has ever faced, is both inefficient and unfair. It is certainly true that as to any particular case it is more efficient to resolve all issues involving the same set of facts in a single forum. It does not follow, however, that the mere possibility of bifurcated adjudication in some indeterminate number of cases makes it more efficient to accord courts *de novo* jurisdiction over claims against the receiver. In giving FSLIC exclusive authority to adjudicate claims against failed S&Ls in the first instance, Congress provided a mechanism for promptly determining those claimants with a valid claim against the receivership assets. By contrast, court adjudication of suits brought *by* FSLIC does not affect the number of creditors entitled to share in the estate.

Coit's and Watson's fairness argument also misses the mark. If the Bank Board rejects a claim against the estate, FSLIC may well argue that that determination bars certain defenses to an action by FSLIC against the

claimant in the judicial arena. However, collateral estoppel applies only if the court holds that the claimant had a full and fair opportunity to litigate the issue in the administrative forum. See *University of Tennessee* v. *Elliott*, 106 S. Ct. 3220, 3227 (1986). If the court makes such a finding, it is hard to see how the litigant can complain about unfairness.

II. THE SYSTEM ESTABLISHED BY CONGRESS FOR THE RESOLUTION OF CLAIMS AGAINST A FAILED SAVINGS AND LOAN ASSOCIATION DOES NOT VIOLATE THE CONSTITUTION

Coit asserts that the administrative claims process violates Article III, the Due Process Clause, and the Seventh Amendment. This Court, like the court of appeals (see Pet. App. A4), should not reach these issues because they are not ripe. In any event, Coit's constitutional objections are wholly insubstantial.

A. According FSLIC Exclusive Authority To Adjudicate Claims In The First Instance Does Not Violate Article III Of The Constitution.

Coit asserts that according FSLIC exclusive authority to adjudicate claims in the first instance violates Article III of the Constitution. This Court recently set forth a balancing approach for resolving such contentions:

> [I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused are [1] the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III.

CFTC v. *Schor*, 106 S. Ct. 3245, 3258 (1986) (citations omitted). Applying this approach to FSLIC's adjudicative authority demonstrates that Congress has not violated Article III.

1. *The administrative claims process reserves the essential attributes of judicial power to Article III courts.*

The administrative claims process satisfies the first of *Schor*'s indicia of constitutionality because, despite the delegation of certain adjudicative functions to FSLIC and the Bank Board, Article III courts retain the "essential attributes of judicial power." In the case of the administrative claims process administered by FSLIC and the Board, Congress has not delegated "all ordinary powers of district courts," as it did in the bankruptcy judge legislation held invalid in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982). Thus, like the CFTC in *Schor* and unlike the bankruptcy judges in *Northern Pipeline*, FSLIC and the Bank Board have no authority to preside over jury trials, issue writs of habeas corpus, or cite individuals for contempt. Compare *Schor*, 106 S. Ct. at 3259, with *Northern Pipeline*, 458 U.S. at 85. FSLIC and the Board have no power to compel process or issue any kind of order. Like the CFTC, and unlike bankruptcy judges, FSLIC and the Board must apply to the courts to enforce their determinations. Compare *Schor*, 106 S. Ct. at 3259, with *Northern Pipeline*, 458 U.S. at 85.

Furthermore, Congress has left ample opportunity for judicial review of Bank Board claims determinations. Pursuant to the APA, Article III courts may review all of the Bank Board's decisions of law *de novo*, and may review its findings of fact to determine whether they were arbitrary, capricious, or not supported by substantial evidence. 5 U.S.C. 706. See *Ass'n of Data Processing Service Organizations, Inc.* v. *Bd. of Governors of the Federal Reserve System*, 745 F.2d 677, 683-684 (D.C. Cir. 1984) (Scalia, J.) (arbitrary and capricious review encompasses review for substantial evidence).[6] This standard of review, which is far more searching than the "fraud, misconduct, or misrepresentation" standard held adequate to preserve the "'appropriate exercise of the judicial function'" in *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 592 (1985) (citation omitted), is fully adequate to preserve the essential role of Article III courts. See Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 976-991 (1988) (questions of law should be reviewable *de novo*; questions of fact should be reviewable, if at all, for substantial evidence).

Significantly, the standard for reviewing Bank Board determinations is no less stringent than the standard of review that prevailed for adjudications by referees under the Bankruptcy Act of 1898. Although that standard varied somewhat over time,[7] it never permitted *de novo* judicial proceedings, and yet was never subject to serious challenge. Cf. *Northern Pipeline*, 458 U.S. at 92 (Burger, C.J., dissenting). Currently, the decisions of bankruptcy courts in core proceedings are subject to review by the district court under the clearly erroneous standard. Bankruptcy Rule 8013. See also Bankruptcy Rule 8006 (prohibiting presentation of new evidence before the district court).

The process of liquidating an S&L is no different from the process of liquidating any other bankrupt. If deferential review of decisions by non-Article III adjudicators in core bankruptcy proceedings has never been found to violate Article III, there is no reason why deferential

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[6] Two courts of appeals have stated that claimants dissatisfied with the Bank Board's determinations are entitled to judicial review under the APA following exhaustion of their administrative remedies. See *Lyons*, 828 F.2d at 390; *Hudspeth*, 756 F.2d at 1103.

[7] Compare *In re Van Jeffreys*, 50 Am. B.R. (N.S.) 328 (W.D. Pa. 1942) (referee's order not to be set aside unless no testimony supports it or referee acted arbitrarily or capriciously), with *In re Bresnan*, 45 F.2d 193, 194 (D. Md. 1930) (referee's findings are not to be set aside unless "manifestly erroneous").

review of adjudications with respect to the assets of insolvent S&Ls should suffer from Article III deficiencies.

In short, other than the power to decide claims in the first instance, all attributes of judicial power remain in Article III courts. In this sense, FSLIC and the Bank Board are just like all other federal agencies empowered to adjudicate issues within their area of expertise. If FSLIC and the Board do not satisfy the first prong of the *Schor* test, neither would the National Labor Relations Board, the Social Security Administration, the Federal Trade Commission, and dozens of other agencies that perform adjudicative functions subject to judicial review under the APA.

2. *The claims that Congress gave FSLIC exclusive authority to adjudicate are of the type that traditionally need not be given to Article III courts.*

Congress gave FSLIC authority to make the initial determination of a narrow category of claims: creditors' claims against property that FSLIC possesses as receiver for an insolvent S&L. FSLIC has no power to adjudicate issues involving assets not in its possession. If it believes that property in the possession of a third party is part of the insolvent S&L's assets, it must seek possession of that property in court. Similarly, if the S&L has any kind of claims for damages against a third party, FSLIC must pursue that claim in court.

Again, a compelling analogy exists between FSLIC's role as receiver and the role of bankruptcy referees under the Bankruptcy Act of 1898. The adjudicative jurisdiction of these referees "was circumscribed by notions of possession of property." 1 *Collier on Bankruptcy* ¶ 3.01, at 3-9 (15th ed. 1987). Thus, under the 1898 Act, the trustee had to proceed in federal or state court to seek property of the bankrupt in the possession of a third party and to bring any kind of action against a third party on the bankrupt's behalf. *Id.* at 3-9 to 3-11.

The Bankruptcy Reform Act of 1978 superseded the 1898 Act and gave non-Article III bankruptcy courts jurisdiction to hear "all civil proceedings arising under [the Bankruptcy Code] or arising in or *related to* cases under [the Bankruptcy Code]." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, ch. 90, § 1471(b), (c), 92 Stat. 2549, 2668 (formerly codified at 28 U.S.C. § 1471(b), (c)) (emphasis added). Under this provision, "[t]he idea of possession or consent as the sole bases for jurisdiction [was] eliminated. The bankruptcy court [was] given in personam jurisdiction as well as in rem jurisdiction to handle everything that [arose] in a bankruptcy case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977).[8] It was this practically unbounded grant of jurisdiction to non-Article III bankruptcy courts that resulted in the invalidation of the Bankruptcy Reform Act in *Northern Pipeline*.

Northern Pipeline involved a contract claim by the bankrupt against a third party. Under the 1898 Act, the trustee would have had to bring this action in either state court or an Article III federal court. See Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 Creighton L. Rev. 441, 460 (1983). The Bankruptcy Reform Act, however, permitted the non-Article III bankruptcy court to hear the claim.

The *Northern Pipeline* plurality noted that Congress could have given non-Article III courts jurisdiction to hear certain claims relating to the bankrupt, but not others: "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a 'public right,' but the latter obviously is not." 458 U.S. at 71. This distinction implicitly adopts the division of adjudicative authority that existed for

[8] The quoted language referred to a House bill that would have made the bankruptcy courts Article III tribunals. The description of the jurisdiction of the courts, however, applies equally to the non-Article III courts that Congress eventually created. See 1 *Collier on Bankruptcy*, *supra*, ¶ 3.01, at 3-9 n.7.

decades under the 1898 Act. Adjudication of claims against the assets of the bankrupt in the trustee's possession is part and parcel of "the restructuring of debtor-creditor relations." Adjudication of the bankrupt's claims against third parties is not.[9]

As noted above, the claims Congress authorized FSLIC to adjudicate are of precisely the same nature as the cases a referee was empowered to adjudicate under the 1898 Act. The distinction drawn by the *Northern Pipeline* plurality thus makes clear that Congress is constitutionally entitled to delegate the initial resolution of such claims to a non-Article III forum.

3. Congress's decision to delegate adjudicative authority to FSLIC is supported by strong policy reasons.

Congress's reasons for wanting FSLIC to adjudicate all claims in the first instance are compelling. Put succinctly, Congress's paramount concern in enacting the S&L trilogy and the various amendments thereto has been to assist homeowners by assisting S&Ls. Absolutely necessary to achievement of this goal is the fostering of public confidence in the S&L industry and the agencies that regulate it. The public must be willing to deposit money in S&Ls and provide goods and services to S&Ls if the S&L industry is to survive. Congress gave FSLIC and the Bank Board exclusive power to adjudicate claims against S&Ls in liquidating receiverships to avoid the delay, expense, and inconsistencies of court adjudication that could reflect badly upon the state of the S&L industry and could adversely affect the ability of its regulators to assure that depositors and creditors of S&Ls will be promptly and fairly treated in the event an S&L fails. This compelling purpose fully justifies Congress's decision to centralize claims against the assets of failed S&Ls in an administrative forum.

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[9] In any event, Coit's reliance (Br. 43) on the public right/private right distinction is entirely misguided in light of this Court's adoption of the multifactor approach in *Schor*. See *Schor*, 106 S.Ct. at 3259.

Thus, because Article III courts retain the essential attributes of judicial power, because the disputes delegated to FSLIC for initial adjudication are of the kind that need not be directed to an Article III court, and because Congress had weighty reasons for giving FSLIC adjudicatory power, the administrative claims process is fully consistent with Article III.

B. Authorizing FSLIC To Serve As The Exclusive Adjudicator Of Claims In The First Instance Does Not Constitute A Per Se Violation Of The Due Process Clause.

Coit contends that FSLIC's role as exclusive adjudicator of claims in the first instance per se violates due process. The basis for this contention is that FSLIC serves the dual function of insurer and liquidator. The fewer claims that FSLIC allows in its receivership capacity, Coit argues, the more money that FSLIC in its insurance capacity is able to recoup as subrogee to the depositors' claims. This syllogism creates what Coit views as an inherent conflict of interest in violation of due process.[10]

This argument totally ignores Congress's mandate to FSLIC to pay all valid credit obligations, 12 U.S.C. 1729(b)(1)(B), and to "give due consideration to the interest of all of the claimants upon the assets of the association * * *." S. Rep. No. 1263, 90th Cong., 2d

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[10] Coit relies primarily upon *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), and *Tumey* v. *Ohio*, 273 U.S. 510 (1927). However, the instant case is more like *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980), in which the Court upheld the child labor enforcement provision of the Fair Labor Standards Act against a due process challenge. The Court noted in *Jerrico* that although fines assessed against violators are returned to the Department of Labor, neither the officials responsible for determining violations in the first instance, nor their regional offices, stand to gain from assessment of penalties. *Id.* at 250-251. The *Jerrico* Court contrasted this lack of a personal stake with the financial incentives present in *Ward* and *Tumey*. See *id.* at 251. Here, as in *Jerrico*, the possibility of inherent bias is minimized by the absence of personal incentives for FSLIC adjudicators to deny claims unjustly.

Sess. 10 (1968). In carrying out their statutory mandates, all agencies, including FSLIC, are entitled to a presumption "that they will act properly and according to law." *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965). As the Court said in dismissing a due process challenge to the Bank Board's dual roles of appointing conservators and presiding over hearings to determine whether the conservators were properly appointed, it is inappropriate for courts to "assume in advance that an administrative hearing may not be fairly conducted." *Fahey* v. *Mallonee*, 332 U.S. 245, 256 (1947).

Moreover, the dual role Congress gave FSLIC is not unique in administrative law. Several administrative agencies adjudicate claims that, if allowed, would decrease the amount of funds that they are charged with administering. The Social Security Arministration (SSA) is but the most obvious example. It adjudicates thousands of disputes involving direct disbursements from the various insurance trust funds it administers. SSA's interest in the outcome is directly analogous to FSLIC's because SSA too has conflicting responsibilities to conserve the trust funds but also pay valid claims.

In considering challenges to congressional delegations of power to administrative agencies, the Court repeatedly has stressed that the burden to establish a per se due process violation is a heavy one. There is a "strong presumption in favor of the validity of congressional action" in light of the " 'congressional solicitude for fair procedure * * *.' " *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982) (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979)). Coit has suggested no persuasive reason for departing from long-settled precedent eschewing determinations of per se due process violations. It is possible that due process might be violated in an individual case. Claimants properly may assert such a violation before the Board, which reviews FSLIC's determinations of the invalidity of claims *de novo*. If claimants are still dissatisfied following Bank Board review, they may raise the same contention in court. Access to administrative and judicial review fully protects their due process rights. There is no need to go further and invalidate the entire claims determination process based on unsubstantiated allegations of potential bias.

C. The Seventh Amendment Does Not Bar FSLIC Adjudication Of Claims In The First Instance.

Coit contends that authorizing FSLIC to decide all claims in the first instance deprives claimants of their Seventh Amendment right to jury trial. This Court has stated repeatedly, however, that "there is little or no basis for concluding that the Amendment should * * * be interpreted to provide an impenetrable barrier to administrative factfinding under *otherwise valid* federal regulatory statutes." *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 460 (1977) (emphasis added); see also *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974) (footnote omitted) ("[T]he Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme.").

In other words, if Congress may delegate authority to adjudicate a claim to an agency without violating Article III or due process, the Seventh Amendment does not bar that delegation even though the jury trial right might have applied had Congress left authority to adjudicate that claim with the courts. *Pernell* v. *Southall Realty*, 416 U.S. 363, 383 (1974) (explaining *Block* v. *Hirsh*, 256 U.S. 135, 158 (1921)).

In any event, even if the valid delegation of authority to FSLIC were not dispositive of the Seventh Amendment issue, claimants in the administrative process would not have a right to jury trial. That right is circumscribed by one inherent limitation: the action must be of the type that would have been tried in courts of law, as opposed to courts of equity or admiralty, at the time the Seventh Amendment was adopted. *Atlas Roofing*,

430 U.S. at 449. Claims raising equitable issues or seeking equitable relief are not claims "at common law" and do not give rise to the jury trial right. *Id.* at 449; *Katchen*, 382 U.S. at 336-338.

Coit's claims against FSLIC seek adjudication of interests in FirstSouth assets now in FSLIC's possession and control by virtue of its appointment as liquidating receiver. This Court has held that claims against a bankruptcy estate sound in equity, not at law, and that therefore the right to jury trial is inapplicable. See *Katchen*, 382 U.S. at 336-337; *Barton* v. *Barbour*, 104 U.S. 126, 134 (1881) ("a claim of debt or damages against the bankrupt is investigated by chancery methods"). The Court has explained that even if a claimant against a bankruptcy estate might otherwise be entitled to a jury trial, "when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity. The Bankruptcy Act passed * * * to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to pro rata share of the *res* * * *." *Katchen*, 382 U.S. at 336 (citations omitted).

The S&L statutes serve the same function as the old Bankruptcy Act. They create an orderly process for the allowance and disallowance of claims against an insolvent institution, so that pro rata shares of the receivership estate may be determined. Cf. *Barton*, 104 U.S. at 134 ("Very analogous to the case of an assignee in bankruptcy is that of a receiver of an insolvent railroad company or other corporation."). Thus, they too convert legal claims into equitable ones. Accordingly, FSLIC, like the bankruptcy courts under the old Bankruptcy Act, need not provide a jury trial when performing its claims determination function.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 87-996

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Supreme Court of the United States

OCTOBER TERM, 1987

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Petitioner,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER FOR FIRSTSOUTH, F.A.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

OBJECTION TO THE MOTION OF THE FEDERAL HOME LOAN BANK OF DALLAS, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, AND FEDERAL HOME LOAN BANK OF TOPEKA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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Pursuant to Rule 36 of the rules of this Court, Petitioner Coit Independence Joint Venture ("Coit") objects to the request of the Federal Home Loan Bank of Dallas, the Federal Home Loan Bank of San Francisco, and the Federal Home Loan Bank of Topeka (hereinafter sometimes the "Banks") to file an amici curiae brief supporting affirmance of the court of appeals' judgment. Coit objects on the grounds that (1) the Banks have not complied with all prerequisites to filing such brief, and (2) the Banks are instrumentalities of the federal government, whose interests are already represented by the Solicitor General, and therefore should not be permitted to simultaneously present a legal position contrary to that of the Solicitor General.

First, Coit objects on the ground that the Banks failed to comply with all prerequisites to filing their brief. Specifically,

the Banks did not seek the consent of Coit prior to filing their motion. The Banks' proposed brief was filed in manuscript form on June 17, 1988, the due date for the Solicitor General's brief. However, no effort to seek Coit's consent for the filing of the Banks' brief was made until June 20, 1988, three days after the deadline for filing, even though Coit's brief has been on file in this case since May 5, 1988. Rule 36 of this Court's rules contemplates the filing of a motion for leave only after consent has been sought and "refused." Here, the motion for leave was filed first and consent was sought only *after the fact*. Since the request for consent was "untimely," the prerequisites for such a motion were not met and the motion should be denied.

Second, Coit objects on the ground that the Banks' motion constitutes an attempt by instrumentalities of the federal government to present simultaneous and contradictory responses to Coit's legal arguments. Of central concern in this case is whether Congress granted to FSLIC, as receiver, the exclusive authority to adjudicate the validity of state law causes of action asserted against failed savings and loan associations under FSLIC receivership. The Solicitor General, on behalf of FSLIC, has taken the position that Congress did *not* grant FSLIC such power. *See* Brief for the Respondent at 16 ("We believe that where, as here, a creditor's suit is already pending in court when the Bank Board appoints FSLIC as receiver, the claimant's obligation to exhaust the administrative claims process does not deprive the court of jurisdiction."); *see also id.* at 20, n. 13 ("The Bank Board . . . has asserted that the process of allowing or disallowing claims is an administrative "adjudication" subject to judicial review under the [APA]. The Solicitor General does not endorse that position . . . ."). By contrast, the Federal Home Loan Banks, as amici curiae, espouse the position that FSLIC *has* exclusive authority to adjudicate claims against failed savings

and loan institutions in the first instance, subject only to review by the Bank Board and judicial review under the APA. *See* Banks' proposed brief at 1-3.

Coit objects to the Banks' attempt to present a response to Coit's legal position which is contrary to that taken by the Solicitor General. As admitted by the Banks in their motion, "[e]ach District Bank is a federal instrumentality organized in the form of a corporation." Banks' Motion for Leave at 1. This conclusion is also based upon federal statutes and regulations. First, 12 U.S.C. § 1437 establishes the Federal Home Loan Bank Board (the "Board") as an independent agency of the executive branch of the federal government. In turn, 12 U.S.C. § 1423 empowers the Board to establish the Federal Home Loan Banks. Moreover, 12 U.S.C. § 1431(a) states that the powers of the Federal Home Loan Banks are subject to the rules and regulations of the Board. Finally, 12 C.F.R. § 501.11 of the Board's regulations designates the President of each Federal Home Loan Bank as the "Principal Supervisory Agent" of the Board and FSLIC, who may in turn appoint other officers and/or employees of such Banks as additional "Supervisory Agents" of the Board and FSLIC. This regulation empowers such agents to, *inter alia*, "represent the Board and [FSLIC] in supervising and examining Federal savings and loan associations and other institutions in the Bank's district which are insured by [FSLIC]."

The interests of the Banks, as instrumentalities of the federal government, are already represented by the Solicitor General, who is charged by statute with the duty to represent the United States before this Court. *See* 28 U.S.C. § 518 ("[T]he Solicitor General *shall* conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested"). (Emphasis added). If the United States is permitted to file additional briefs and speak, like Cerberus,

with many heads through a multitude of its instrumentalities, then not only can it undermine the limitations imposed by 28 U.S.C. § 518 (which requires the United States to present its case before this Court in an orderly manner through a single spokesman), but it can also present such an array of arguments and positions that opposing counsel will be overwhelmed and unable to effectively answer the United States within the page limitations allowed by this Court's rules. Furthermore, the contrary positions taken by the Solicitor General and the Banks in this case reflects an intra-governmental dispute which properly should be resolved prior to coming to this Court. The Banks' brief is the brief of a party, not amici curiae.

For the foregoing reasons, the motion of the Federal Home Loan Bank of Dallas, the Federal Home Loan Bank of San Francisco, and the Federal Home Loan Bank of Topeka to file an amici curiae brief in support of affirmance of the court of appeals should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-996

COIT INDEPENDENCE JOINT VENTURE, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION
AS RECEIVER FOR FIRSTSOUTH, F.A.

**On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

REPLY OF THE FEDERAL HOME LOAN BANK OF DALLAS, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, AND FEDERAL HOME LOAN BANK OF TOPEKA TO PETITIONER'S OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Petitioner advances two grounds in opposition to the Motion of the Federal Home Loan Banks of Dallas, San Francisco, and Topeka for Leave to File Brief as Amici Curiae. As we demonstrate below, neither point has merit.

1. Petitioner first contends that the Banks' motion is untimely, because counsel for the Banks did not seek petitioner's consent until June 20, 1988. Petitioner admits, however, that the Banks' motion and proposed brief were timely filed on June 17, 1988. More importantly, petitioner's opposition surely cannot be read as suggesting that petitioner would have consented to the Banks' filing had such consent been requested on June

17, 1988; indeed, petitioner's second argument against the Banks' filing—that the Banks are federal instrumentalities and ought to be represented by the Solicitor General—clearly indicates that petitioner would have opposed the Banks' request for consent regardless of the date on which it was sought.[1]

We note also that the Banks' counsel did not seek petitioner's consent prior to June 20 because it was not until June 16, 1988, the day before the proposed brief was due for filing, that the Banks decided that they might wish to file a brief. The Banks' counsel accordingly determined that the Banks would proceed by motion rather than attempt to obtain the parties' consent at the last moment. The motion and accompanying brief were timely filed on June 17, 1988.

Thereafter, the Banks' counsel contacted petitioner's counsel on June 20, 1988, *at the request of the Clerk's Office*. That request was made in an attempt to obviate the need for burdening this Court with consideration of a motion for leave to file a brief that was timely tendered to the Clerk's Office. The Clerk's Office advised the Banks' counsel that "after-the-fact" consent would be acceptable. Significantly, the Banks' counsel contacted counsel for the respondent at the same time and, in response, received the Solicitor General's written consent to the filing of the Banks' proposed brief. The fact that petitioner's counsel chose to refuse consent—and apparently would have done so whenever it might have been requested—does not render the Banks' motion and proposed brief untimely.

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[1] In any event, petitioner's consent now *has* been refused, as petitioner contends is required by Rule 36 of the Rules of this Court, and the Banks' motion was timely filed. Thus, petitioner's only real objection is that the Banks' motion as filed on June 17 did not state that consent had been refused. The motion has since been corrected to indicate that consent has been refused.

2. Petitioner's second argument is that the Banks are "instrumentalities of the federal government," whose interests "are already represented by the Solicitor General" (Pet. Objection at 3). This argument is misguided. Although the Banks are federal instrumentalities, their stock is entirely owned by private member institutions. 12 U.S.C. 1426; S. Rep. No. 778, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S. Code Cong. & Admin. News 2610, 2611. A majority of the Banks' directors are chosen by these private member institutions (12 U.S.C. 1427), and none of the Banks' directors or employees are on the federal payroll. Moreover, the Banks themselves are enormous commercial enterprises with substantial financial interests at stake in FSLIC receivership proceedings. (The Banks' structure and functions are explained in more detail in their motion, which is bound with their proposed brief.) The Banks are thus materially different from federal agencies, and the Solicitor General's responsibility for presenting the views of the federal government in this case (see 28 U.S.C. 518(a)) does not extend to representation of the Banks. The Solicitor General has recognized as much by giving his written consent to the filing of the Banks' brief.

In addition, the Banks' ability to represent their own interests is supported by their long history of independent representation in this Court. For example, the Federal Home Loan Bank of Los Angeles was represented by private counsel in *Fahey* v. *Mallonee*, 332 U.S. 245 (1947), and the Federal Home Loan Bank of San Francisco was represented by private counsel in *Mallonee* v. *Federal Home Loan Bank of San Francisco*, No. 611 (Br. in Opp. filed Feb. 1, 1956); *Long Beach Fed'l Savings & Loan Ass'n* v. *Federal Home Loan Bank of San Francisco*, No. 731 (Mot. to Dismiss filed Mar. 27, 1956); and *Fidelity Financial Corp.* v. *Federal Home Loan Bank of San Francisco*, No. 86-696 (Br. in Opp. filed

Jan. 6, 1987).[2] The Solicitor General appeared on behalf of the Federal Home Loan Bank Board and its members in all but the *Fidelity Financial* case, to which the Bank Board was not a party. Thus, there is a long-standing history of side-by-side appearances by the Solicitor General on behalf of the Bank Board and private counsel on behalf of the Banks.

Finally, as petitioner itself acknowledges (Pet. Objection at 2-3), the Banks' need for separate representation in this case is readily apparent from a comparison of the brief filed by the Solicitor General with the Banks' proposed brief. Although the Banks have endorsed portions of the Solicitor General's arguments in this case, they also have advanced arguments that the Solicitor General has chosen not to present. Contrary to petitioner's argument, however, the Banks' additional arguments do not impose any extra burden on petitioner. The position espoused by the Banks is the same as that adopted by the court of appeals, and thus it is the position that petitioner has been prepared to address from the outset of this litigation. Moreover, the argument advanced by the Solicitor General leaves this Court in the position of having to decide this case without benefit of a brief that fully defends the court of appeals' judgment. The Banks' brief, by contrast, provides the Court with the adversary presentation of views so necessary to this Court's decisionmaking process.

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[2] The Federal Reserve Banks, which operate pursuant to a statutory scheme similar to that of the Federal Home Loan Banks, also have appeared in this Court through privately-retained counsel. See *The Chase Manhattan Bank, N.A.* v. *Vishipco Line*, No. 81-1591 (Br. of Federal Reserve Bank of New York as Amicus Curiae filed Mar. 27, 1982). Notably, the Solicitor General appeared not on behalf of the Federal Reserve Bank, but instead to present the views of the United States. See *ibid.* (Br. for the United States as Amicus Curiae filed Oct. 6, 1982).

In sum, because the Banks are not federal agencies, because they have always been represented by privately-retained counsel in this Court, because the Solicitor General has chosen not to fully defend the court of appeals' judgment in this case, and because the Solicitor General has consented to the Banks' filing of a separate brief, petitioner's opposition to the Banks' Motion for Leave to File Brief as Amici Curiae should be rejected.

Respectfully submitted.

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AS RECEIVER OF FIRSTSOUTH, F.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I. FSLIC HAS CONCEDED THAT IT LACKS THE STATUTORY AUTHORITY TO ADJUDICATE CREDITOR CLAIMS.

Respondent Federal Savings and Loan Insurance Corporation ("FSLIC"), now represented before this Court by the Solicitor General, has conceded that it does not have the power to adjudicate creditor claims followed by limited judicial review under the Administrative Procedure Act,[1] contrary to its prior position and the holding of the court of appeals in this case.[2] FSLIC has further conceded that the dismissal of this case for lack of subject matter jurisdiction

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[1] 5 U.S.C. (& Supp. IV) §§ 701 *et seq.* (the "APA")

[2] *See* Brief for the Respondent at 20, n.13 (hereinafter "B.R. ...."). ("The Bank Board . . . has asserted that the process of allowing or disallowing

was error,[3] and that this Court should "vacate the court of appeals' decision . . .." B.R. 39. Petitioner Coit Independence Joint Venture ("Coit") accepts these concessions,[4] and believes that they represent a long overdue recognition that the position taken by FSLIC below was not a defensible one, and would have wreaked havoc with the constitutional rights of claimants and ousted the federal courts of the power to hear a broad range of claims over which Congress has given them exclusive original jurisdiction.[5]

However, FSLIC attempts to preserve the remnants of the decision below by recasting the holding of the court of appeals as one requiring claimants to exhaust their administrative remedies before suing in court.[6] Although an exhaus-

claims is an administrative 'adjudication' subject to judicial review under the [APA]. The Solicitor General does not endorse that position . . ..").

[3] *See* B.R. 16 ("We believe that where, as here, a creditor's suit is already pending in court when the Bank Board appoints FSLIC as receiver, the claimant's obligation to exhaust the administrative claims process does not deprive the court of jurisdiction."); B.R. 39 ("In the Solicitor General's view, it is not accurate to say that Section 5(d)(6)(C) limits the subject-matter jurisdiction conferred by 12 U.S.C. 1730(k)(1).").

[4] FSLIC never expressly states that *de novo* review would be available following exhaustion of administrative remedies. However, if FSLIC does not contemplate *de novo* review in court, its concession would be a change in name only and all of Coit's constitutional and statutory arguments raised in its main brief would be unaffected by FSLIC's concession. Nonetheless, because FSLIC repeatedly acknowledges the right of claimants to "sue in court" or to seek "judicial enforcement" or "judicial resolution" of claims following administrative action (B.R. 15, 16, 20, n.13), Coit will assume that FSLIC's new position contemplates *de novo* review in court following completion of the administrative process.

[5] *See* Brief for Petitioner at 40, and n.33. *See also* Brief of Amicus Curiae U.S. League of Savings Institutions at 4-9, and Brief of Amicus Curiae Watson *et al.*, at 5-8.

[6] *See* B.R. 19-20 ("Whatever the scope of the *Hudspeth* decision, we seek to defend the decision in the present case *only* on the ground that the Bank

tion requirement does not appear to have been explicitly raised in the courts below,[7] Coit submits that there is no more of a statutory basis for imposing an exhaustion requirement on claimants than there was for granting FSLIC the power to adjudicate such claims.

FSLIC suggests that Coit has impliedly recognized the legitimacy of an exhaustion requirement.[8] This is incorrect. Coit does not challenge the Federal Home Loan Bank Board's (the "Board's") authority to establish a *voluntary* claims procedure. However, Petitioner does dispute FSLIC's assertion that the filing of such claims is a prerequisite to suit and that judicial remedies must be held in abeyance pending the administrative processing of any such claim. A recognition of the Board's authority to establish a voluntary claims procedure is not tantamount to the acceptance of a mandatory exhaustion requirement.[9] The receiver's authority to

Board and FSLIC plainly do have power to require claimants first to present their claims to FSLIC, and exhaust the administrative process . . ..") (emphasis added); and *id.* at n.13 ("The Solicitor General . . . defends the judgment below to the extent that it requires a creditor to present his claim to FSLIC and exhaust the claims review process before suing on the claim.").

[7] Joint Appendix at 27-28 (hereinafter "J.A. ....").

[8] *See* B.R. 27 ("Coit appears to concede that the Bank Board's regulations give FSLIC 'the right in the first instance to decide whether to pay or refuse to pay a claim.' ").

[9] A voluntary claims procedure exists under the National Bank Act (see 12 U.S.C. § 194), an Act that empowers the Comptroller of the Currency to appoint receivers over national banks. However, despite repeated arguments that this claims procedure was mandatory, the courts have consistently held that the presentation of claims to a national bank receiver is not a prerequisite to suit. *See e.g., Schulenberg v. Norton*, 49 F.2d 578, 580 (8th Cir. 1931); *Martin v. First Nat'l Bank of Rush City*, 51 F.2d 840, 848 (D. Minn. 1931). While it is true, as FSLIC points out, that the National Bank Act expressly permits creditors to present their claims in court (*see* B.R. 23-24, n.16), this distinction is not controlling. Claimants against

pay or not to pay claims may be exercised as an alternative to or concurrently with the authority of the courts to determine the validity and amount of claims. Coit has never agreed that judicial remedies must await the Board's and/or FSLIC's decision to pay or not to pay a claim, however long that may take.

II. Congress Did Not Intend To Require Creditors Of A Failed Savings And Loan To Exhaust Administrative Claims Procedures Before Resorting To The Courts.

A. Exhaustion Of Administrative Remedies May Be Required Only If It Is Consistent With Congressional Intent.

This Court has held that "the initial question whether exhaustion is required should be answered by reference to Congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 501-02 (1982) (emphasis added). Accordingly, a court should not relinquish an affirmative grant of jurisdiction absent a clear Congressional intent to require exhaustion of administrative remedies.

There is no express statutory requirement in any of the Board's or FSLIC's enabling legislation which makes any reference whatsoever to the exhaustion of administrative

failed savings and loan institutions are also authorized to sue in court under affirmative jurisdictional grants of power to bring specific federal or state causes of action, *see, e.g.*, 15 U.S.C. § 78aa (1982) (Securities Exchange Act of 1934); 18 U.S.C. § 1964 (1982) (RICO), and nothing in the Home Owners' Loan Act or the National Housing Act prohibits claimants from exercising these rights in the context of a FSLIC receivership. *See* 12 U.S.C. § 1730(k)(1). In short, the presumption is that the claims procedure merely supplements judicial remedies unless FSLIC's enabling legislation expressly curtails a claimant's access to the courts.

remedies by claimants against a failed savings and loan institution. As FSLIC itself admits, "HOLA itself does not say, in terms, that claimants must present their claims to the receiver and exhaust that process before proceeding in court." (B.R. 29). Instead, FSLIC infers a Congressional intent to require exhaustion from a series of statutes which confer broad regulatory power over savings and loan associations, but which nowhere grant the Board express authority to regulate the rights of persons having claims against such institutions. Although it is true that "Congress delegated to the Board broad authority to establish and regulate 'a uniform system of [savings and loan] institutions,' "[10] the power to regulate the savings and loan institutions themselves is not the equivalent of the power to regulate the rights of third parties who have claims against those institutions. In discussing the statutory authority conferred on the Board, FSLIC has ignored this vital distinction.

B. The Statutory Provisions Relied Upon By FSLIC Do Not Demonstrate A Congressional Intent To Require Exhaustion.

1. *12 U.S.C. § 1464(d)(6)(C)*

In support of its position that Congress intended a mandatory exhaustion requirement, FSLIC relies on the language of 12 U.S.C. § 1464(d)(6)(C) of the Home Owners Loan Act (hereinafter "HOLA") which provides that "no court may . . . restrain or affect the exercise of powers or functions of the conservator or receiver." However, as discussed in the Brief for Petitioner (hereinafter "B. Pet. . . . ."), this provision was designed to "give FSLIC as statutory receiver the same protection from interference with its

[10] *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 166 (1982).

dominion and control over receivership property as a common law receiver could have obtained from a receivership court."[11] The "restrain or affect" language was never intended to act as a bar to insulate FSLIC from *in personam* actions like the present one which do no more than seek to establish the validity and amount of a claim against a debtor in receivership. *See Morris v. Jones*, 329 U.S. 545 (1946); *Riehle v. Margolies*, 279 U.S. 218 (1928); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 69 F.2d 60 (2d Cir. 1934).

Contrary to the position taken by amici on the difference between statutory and equity receiverships,[12] the rule announced in the foregoing cases, i.e. that a suit to liquidate a claim does not interfere with the powers or functions of a receiver, has also been applied to "statutory receiverships" such as those over national banks. *See Bank of Bethel v. Pahquioque Bank*, 81 U.S. (14 Wall.) 383, 20 L. Ed. 840 (1871). Although the specific "restrain or affect" language is not

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[11] B. Pet. 17-18; *see also* B. Pet. 15-18.

[12] *See* Brief for the Federal Home Loan Bank of Dallas, et al., at 13- 16 and n.5; and Brief for National Council of Savings Institutions at 20.

Amici also rely in their briefs on recent amendments to the Federal Credit Union Act ("FCUA") contained in the Competitive Equality Banking Act of 1987, 12 U.S.C. §§ 1787(a)(1)(B) and 1787(j), and accompanying legislative history. *See* Brief for Amicus National Council at 14-17; Brief of Amici Federal Home Loan Banks at 16-17. This reliance is misplaced because under the FCUA, the validity of claims may be "adjudicated in a court of competent jurisdictation," 12 U.S.C. § 1766(b)(4)(B) (1980), a premise that is inconsistent with a mandatory and exclusive administrative scheme. The amendments relied on did not alter the courts' jurisdiction to determine the validity of claims, and, as commentary on similar language in HOLA and NHA, the legislative history is nothing but the post hoc comment of a subsequent Congress, *see Consumer Product Safety Commission v. GTE Sylvania*, 64 L. Ed.2d 766, 778 (1980), in connection with a totally different statute. Significantly, the Solicitor General does not rely in his brief on FCUA and amendments thereto.

contained in the National Bank Act,[13] the federal courts have long recognized that a statutory receiver appointed by the Comptroller of the Currency is not subject to judicial interference, except in extraordinary circumstances. *See Earle v. Pennsylvania*, 178 U.S. 449 (1900); *Edson Realty Co. v. Commercial Nat'l Bank*, 29 F. Supp. 22, 27 (W.D. La. 1939); *Way v. Camden State Deposit & Trust Co.*, 21 F. Supp. 700, 702-04 (D.N.J. 1937). Despite this prohibition, suits by claimants to establish the validity and amount of their claims against national banks have never been considered an interference with the receiver because:

> [T]he judgment when recovered will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment creditor any preference over other creditors whose claims are proven before the receiver. All alike must await the action of the Comptroller of the Currency, and be content with a just and legal distribution of the proceeds of the assets collected by the receiver and liquidated by the comptroller according to the act of Congress in such case made and provided.

Bank of Bethel, 14 Wall. at 402. *See also Earle v. Pennsylvania*, 128 U.S. at 455.

Similarly, in this case, any judgment recovered from a court must be presented to FSLIC as receiver in order to secure a ratable distribution of assets. Thus, this type of suit in no way restrains or affects the powers or functions of a receiver within the meaning of Section 1464(d)(6)(C). Because the purpose of this statutory language is to preserve the receiver's possession of the property of the insolvent debtor, and not to prevent claimants' access to the courts, FSLIC's reliance upon this language as evidence of Congressional

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[13] 12 U.S.C. §§ 1 *et seq.*

intent to require exhaustion of administrative remedies is clearly misplaced.[14]

2. *12 U.S.C. § 1464(d)(11)*

FSLIC relies on its authority to "make rules and regulations . . . for the conduct of receiverships" in 12 U.S.C. § 1464(d)(11) as a basis for adopting the regulations in question. However, the Board's regulations, to the extent that they are construed to prohibit access to the courts before completion of the claims procedure, is not a proper or authorized exercise of administrative power. *Cf. Bowen v.*

[14] FSLIC claims that *Riehle v. Margolies* and *Morris v. Jones* are inapplicable because "[t]he issue in this case . . . is not possession, . . . [but] whether a claimant's suit to establish the amount of the claim would 'restrain or affect' FSLIC's express authority under the NHA and the Bank Board's regulations to determine whether to pay the claim without litigation." *See* B.R. 29-30, n.20. There are two answers to this contention.

First, Coit's reliance upon *Riehle v. Margolies* and *Morris v. Jones* is highly pertinent because historically the purpose behind insulating receivers from judicial interference was to protect their possession of receivership assets, not to prevent claimants from obtaining a judicial resolution of the validity and amount of their claims. The fact that the prohibition against interference with the receiver's functions coexisted with the judicial resolution of claims both at common law and under the National Bank Act demonstrates that Section 1464(d)(6)(C) was not designed to deny claimants access to the courts.

Secondly, the fallacy of FSLIC's suggestion that Section 1464(d)(6)(C) somehow bars judicial interference with any claims process the Board may choose to adopt is demonstrated by the fact that the "restrain or affect" language was first added to HOLA by the Financial Institutions Supervisory Act of 1966. Coit submits that statutory language which first appeared in 1966 could not have been intended to protect a claims procedure adopted as far back as 1941, and clearly was not designed to protect a claims procedure revised (and for the first time made explicitly mandatory) in 1988. *See* 53 Fed. Reg. 13105, 13106.

Finally, FSLIC's characterization of the issue improperly assumes that FSLIC has the authority to determine claims without litigation. Such an approach assumes the very issue in dispute.

American Hosp. Ass'n, 476 U.S. 610, 106 S.Ct. 2101, 2121-23 (1986). The power in Section 1464(d)(11) to "make rules and regulations . . . for the conduct of conservatorships or receiverships" does not encompass the power to limit the access of claimants to the courts. Congress has granted the Board the power to define the functions of the receiver; it has not granted the Board the power to limit the rights of potential litigants with claims against the receivership estate. The Board can no more decree an exhaustion requirement by regulation without a proper statutory basis than it could declare its own decisions immune from judicial review. Whether exhaustion is required is a question of Congressional intent, not administrative fiat. *See Patsy*, 457 U.S. at 501-02.[15]

[15] FSLIC argues that the Board's requirement of a mandatory claims process is a valid exercise of its rule-making power under Section 1464(d)(11), the validity of which must be tested under the well-established standard that a regulation promulgated under the broad grant of rule-making power "will be sustained so long as it is reasonably related to the purposes of the enabling legislation." B.R. 26-28, citing *Mourning v. Family Publications, Inc.*, 411 U.S. 356, 369 (1973). Petitioner disagrees with this analysis.

First, the "Interim Procedures" adopted unilaterally by the Bank Board and published April 21, 1988, are expressly not adopted pursuant to 1464(d)(11) but purportedly pursuant to 1437. 53 Fed. Reg. 13105 (Apr. 21, 1988). They were not adopted, as 1437 requires, in accordance with the notice and comment procedures of 5 U.S.C. 553 (1982), but simply published and made effective retroactively to July 1, 1986. *See* T. Pfeiler, *FSLIC Adjudication of Claims*, 53 Legal Bulletin 433, 461, n.102.

Secondly, the rule-making authority in this case is much narrower than that involved in the *Mourning* case. *Mourning* involved a statute which empowered the agency to "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act." 411 U.S. at 369. The grant of power in the instant case is far more limited. Where there is a narrower grant of power, the scope of an agency's rules and regulations may not exceed the power granted the agency by the enabling legislation. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). *Cf. Zuber v. Allen*, 396 U.S. 168, 183 (1969). Coit submits that FSLIC's power to

3. *12 U.S.C. § 1729(d)*

FSLIC also relies on 12 U.S.C. § 1729(d) of the National Housing Act (hereinafter the "NHA") which provides that FSLIC "shall have the power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise and release claims in favor of or against the insured institutions, and to do all other things that may be

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regulate the conduct of receiverships does not include the power to limit a claimant's assess to the courts.

More importantly, the validity of regulations which purport to limit access to the courts is not tested by a reasonable relationship test, but by the consistency of such regulations with legislative intent. *See Levers v. Anderson*, 326 U.S. 219, 222 n.4 (1945) ("Of course, the mere fact that the regulations might bar judicial review is not conclusive, for the court will consider whether these are consistent with the legislative intent."). *Cf. I.N.S. v. Cardoza-Fonseca*, 94 L. Ed.2d 434, 107 S. Ct. 1207 (1987). Under *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 501-02 (1982), there is a presumption against deferring the exercise of jurisdiction under a federal statute unless it is shown to be consistent with Congressional intent. FSLIC should not be allowed to avoid the burden of showing a Congressional intent to restrict the access of claimants to the courts simply by enacting a regulation requiring a mandatory claims procedure. The issue remains one of Congressional intent, not reasonable relationship, whether an agency regulation requiring exhaustion exists or not.

FSLIC also relies upon *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975) where this Court stated that "[t]he statutory scheme is thus one in which the [agency] may specify such requirements for exhaustion as [it] deems serve [its] own interests in effective and efficient administration." B.R. 28. However, *Weinberger* is completely inapposite because that case involved construction of the Social Security Act which expressly defers judicial review until "after any final decision of the Secretary [of HEW] made after a hearing." *See* 42 U.S.C. § 405(g). The Act also expressly empowers the Secretary to "flesh out" the exhaustion requirement by regulations. 422 U.S. at 766 and n.9. *See also* 42 U.S.C. § 405(a). The quoted statement was thus made in the context of statutory authority which imposed an express exhaustion requirement and which expressly directed the Secretary to implement exhaustion by regulations. Neither authority is granted by the statutes involved in this case.

necessary in connection therewith, subject only to the regulations of the Federal Home Loan Bank Board." Nothing in this language supports a mandatory exhaustion requirement. The power to carry on the business of and to collect obligations of insured institutions simply authorizes FSLIC to manage failed savings and loans and to initiate collection efforts on their behalf, including judicial proceedings in the courts. Similarly, the power to settle, compromise and release claims merely authorizes FSLIC to enter into settlement agreements on behalf of failed savings and loans. Likewise, the power to do all other things in connection "therewith," i.e., in connection with the previously enumerated powers, merely implements such powers, and is therefore no authorization to establish a mandatory claims procedure which would restrict the access of claimants to the courts.

4. *12 U.S.C. § 1729(b)(1)(B)*

FSLIC next argues that the language in 12 U.S.C. § 1729(b)(1)(B) which instructs FSLIC to "pay all valid credit obligations of the association" would be "superfluous if the receiver were expected to await a court's instruction to pay each claim" (B.R. 24). In making this argument, FSLIC once again ignores the well-recognized distinction between the liquidation of a claim, *i.e.*, the establishment of its validity and amount, and the distribution of receivership assets. See *Morris v. Jones*, 329 U.S. at 548-49. The statutory directive to "pay all valid credit obligations of the association" speaks only to FSLIC's role in the distribution process; it does not make FSLIC the exclusive forum for the determination of the validity of claims. There is nothing inconsistent between the directive to FSLIC to pay "valid" credit obligations and a role for the judiciary in determining which claims are valid. This duality was not only recognized at common law; it is made explicit in the National Bank Act, 12 U.S.C. § 194, where the

Comptroller is directed to "make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." (Emphasis added.)

The receiver's duty to pay valid credit obligations is not rendered "superfluous" by the concurrent judicial power to determine the validity of claims. The receiver can always decide to "pay" a claim, thereby rendering moot any outstanding judicial proceeding to determine the validity of a claim. But even if the receiver decides to await the outcome of the judicial proceeding, his duty "to pay" is not rendered superfluous by the court's decision because only the receiver can determine the pro-rata share of the assets payable to those claimants whose claims have been found to be valid either by the courts or the receiver. Accordingly, while only the receiver can make a distribution of assets, nothing in the directive to "pay all valid credit obligations of the association" precludes claimants from resorting to the courts for a determination of the validity of their claims. FSLIC can establish a claims process, but there is no statutory authority for FSLIC to make that process exclusive and mandatory.

5. *12 U.S.C. § 1729(b)(1)(A)(v)*

Finally, FSLIC contends that a mandatory exhaustion requirement is necessary for it to liquidate a failed association "in an orderly manner" as required by 12 U.S.C. § 1729(b)(1)(A)(v). This "necessity" argument is premised on the assumption that a centralized process for all creditor claims is necessary to inform FSLIC of all claims against the receivership estate so that FSLIC can give like treatment to similarly situated claims. B.R. 25-26.

Coit submits that FSLIC has failed to demonstrate why these laudable goals are not equally attainable by a system

which permits a claimant the option of filing a claim with FSLIC and/or filing a complaint in court. The filing of a complaint in court informs FSLIC of the nature and amount of a claim no less than the filing of a proof of claim in the administrative process. Because FSLIC must be served with a copy of each such complaint, the fact that lawsuits may be pending in different locations throughout the country would not prevent FSLIC from establishing a central location where both administrative claims and judicial complaints could be analyzed.[16] If any necessary information is lacking, FSLIC can simply instruct its attorneys to obtain it in the lawsuit or by agreement with opposing counsel.

However, the most compelling argument against FSLIC's assertion that it must have a mandatory claims process in order to perform an orderly liquidation is the fact that the FDIC has liquidated financial institutions for over fifty years without a mandatory claims procedure.[17] The fact that claimants under the National Bank Act have been given the option of filing claims or going to court,[18] and the fact that national bank receivers cannot impose mandatory bar dates which prevent access to the courts,[19] has not prevented the FDIC from accomplishing the orderly liquidation of banks.[20] Furthermore, as far as Coit can ascertain from the published decisions, FSLIC has not had a mandatory claims process

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[16] Furthermore, under Fed. R. Civ. P. 12, FSLIC has 60 days (two months) in which to analyze the claims before its answer is even due and therefore before any attorneys' fees need be expended.

[17] *See* n.9, *supra*.

[18] *See* 12 U.S.C. § 194; *Martin v. First Nat'l Bank of Rush City*, 51 F.2d 840, 848 (D. Minn. 1931).

[19] *See Queenan v. Mays*, 90 F.2d 525, 530-31 (10th Cir. 1937).

[20] *See generally* Note, Creditors Remedies Against the FDIC as Receiver of a Failed National Bank, 64 Tex. L. Rev. 1429 (1986).

until recently and has sought judicial enforcement of an exhaustion requirement only once in the last forty-five years.[21] Finally, trustees in bankruptcy have managed to discharge their duties of liquidating large corporations without a procedure that prevents creditors of the bankrupt from having the validity of their claims determined in court.[22]

For these reasons, FSLIC cannot make a convincing case that its mandate to liquidate a failed association "in an orderly manner" constitutes a statutory authorization to create a mandatory claims procedure. At best, these assertions of necessity are merely policy arguments which should be presented to Congress. They are not indications of Congressional intent. As this Court stated in *Patsy*: "[P]olicy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with Congressional intent." 457 U.S. at 513.

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[21] FSLIC asserts that "[t]he Bank Board has consistently imposed this exhaustion requirement since its original promulgation of its receivership regulations in 1941." B.R. 28, n.19. The accuracy of this assertion is belied by the fact that FSLIC can cite only to a single case, *Community Fed. Sav. & Loan Ass'n v. Fields*, 128 F.2d 705, 706 (8th Cir. 1942), in which exhaustion was raised. Even in *Fields*, the plaintiff's failure to exhaust administrative remedies was raised only as an alternative defense by FSLIC and was not even reached by the court. Furthermore, the Board proposed to change its regulations to expressly exclude review by the courts prior to agency action for the first time in 1985, after the *Hudspeth* decision. *See* 50 Fed. Reg. 48970, 48977 (1985); *see also* 53 Fed. Reg. at 13106 and 13111 (1988).

[22] Indeed, after *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), many creditor claims in bankruptcy must be determined in court. While Section 362 of the United States Bankruptcy Code imposes an automatic stay upon judicial proceedings at the time of the debtor's filing for bankruptcy, such stay in most cases is lifted thirty days after request by an interested party.

III. COUNTERVAILING POLICY CONSIDERATIONS WEIGH STRONGLY AGAINST FSLIC'S PROPOSED EXHAUSTION REQUIREMENT.

The statutory and policy arguments raised by FSLIC in favor of imposing an exhaustion requirement not only fail to withstand close scrutiny, they ignore important countervailing considerations which argue strongly against such a requirement.

A. A Mandatory Claims Process Would Deny Claimants Due Process Of Law Because FSLIC And The Board Are Not Disinterested Tribunals.

Because FSLIC concedes that HOLA and the NHA do not grant FSLIC the power of adjudication, and "[i]f contested, the claimant can take his claim to court for judicial resolution" (B.R. 40), it argues that Coit's constitutional objections, even if ripe,[23] "would have no bearing upon the proper resolution of this dispute." *Id.* Coit emphatically disagrees with this position. While FSLIC's concessions may have muted the force of the constitutional claims under the Seventh Amendment[24] and Article III, Coit's due process chal-

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[23] The court of appeals in this case completely overlooked this Court's discussion of ripeness in *Thomas v. Union Carbide Agricultural Products, Inc.*, 473 U.S. 568, 105 S Ct. 3325, 3332-34 (1985). Coit's constitutional claims are clearly ripe for adjudication under this Court's analysis in *Thomas*. *See also Gibson v. Berryhill*, 411 U.S. 564 (1973).

[24] Amicus argues that Coit's claims against FirstSouth are now claims against the receivership estate, and by analogy to bankruptcy proceedings have been converted into equitable claims to a pro rata share of the *res* as to which the right to jury trial is inapplicable, citing *Katchen v. Landy*, 382 U.S. 323 (1966). Brief of National Council at 27. Coit submits that this is incorrect. After *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), Coit has the right to have the validity of its claims (as opposed to questions of ratable distribution) determined by an Article III court in a proceeding at law. Because of *Marathon*, the bankruptcy analogy in *Katchen* is no longer controlling. Instead, it is the

lenge and the fundamental unfairness of allowing an interested federal agency to develop and apply an exhaustion requirement remain fully intact.[25]

As Coit argued in its opening brief, FSLIC has both a pecuniary interest and an adversarial interest in the allowance or disallowance of claims filed by Coit and other creditors (B. Pet. 44-47). These adverse interests have a significant impact upon FSLIC's proposed exhaustion requirement in a number of important respects.

First, FSLIC's interest in the outcome of Coit's claims is a sufficient basis in and of itself to excuse exhaustion. *See Gibson v. Berryhill*, 411 U.S. 564, 575 (1973) (exhaustion is not required where the governmental agency has a pecuniary interest in the outcome of the claim because such interest makes the administrative remedy inadequate). In such circumstances, "the question of the adequacy of the administrative remedy [becomes] . . . for all practical purposes identical with the merits of [Plaintiff's] lawsuit." 411 U.S. at 575.

Secondly, Congress has assigned to FSLIC the duty to "collect all obligations of the insured institutions."[26] Because

character of Coit's claims which is dispositive. "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).

[25] Coit is hesitant to forego its Seventh Amendment and Article III claims even on the assumption that it will receive *de novo* review in the courts because it is deeply concerned that FSLIC may be trying to accomplish indirectly through "exhaustion" what it cannot do directly through "adjudication." *See* B.R. 21 ("FSLIC would generally expect to contend that the plaintiff is limited [in a subsequent judicial proceeding] to the claim he presented to FSLIC and the Board and must rely on the legal theory and evidence he offered in its support.") Indeed, FSLIC is still claiming adjudicatory power in lower courts, even after the concessions made in this case.

[26] 12 U.S.C. § 1729(d).

of this role, FSLIC will frequently have claims against the very creditors who will be required to submit to FSLIC's mandatory claims procedure. Given FSLIC's role as litigant, together with its pecuniary interest in the outcome of creditor claims, claimants cannot reasonably be expected to have any confidence in the fairness and impartiality of FSLIC's procedures. This Court should hesitate to attribute to Congress an intention to permit FSLIC and the Board to develop and apply a mandatory exhaustion requirement in circumstances where the agency's own impartiality is suspect. *Cf. Tocci v. Yankee Bank for Fin. and Sav., FSB*, CCH Fed. Banking L. Rep. ¶ 87,389 (D.C. Mass. May 25, 1988) ("An interpretation of a statute that attributes to Congress a manifestation of intent to create powers in an agency so likely to lead to impairment of impartiality in adjudication is inherently suspect.").

This concern with FSLIC's lack of impartiality is not merely academic. If the exhaustion requirement proposed by FSLIC is approved, FSLIC will be able to: (1) delay the administrative processing of selected claims; (2) coerce claimants to enter into unfair settlements; and (3) use the administrative process to limit the scope of judicial relief.

FSLIC's newest claims procedure[27] shows this potential for abuse. Under these procedures, FSLIC through its Special Representative has 180 days after receipt of the claim (or after the end of the 90-day notice period, whichever is later) to either allow the claim in full, or retain it for further review.[28] If a claim is not allowed in full, it is automatically retained for further review, and there is no time limit set for

[27] 53 Fed. Reg. 13105 (April 21, 1988). Further revisions have recently been proposed. *See* 53 Fed. Reg. 21474 (June 8, 1988).

[28] *Id.* at 13108.

its disposition.[29] These procedures give FSLIC virtually unlimited discretion to bury large claims like Coit's in the administrative process, and to stay judicial proceedings for an unconscionably long period of time given FSLIC's purportedly limited objectives of centralizing the claims process and deciding whether claims should be paid or not.[30]

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[29] Coit's claim was sent to FSLIC on September 28, 1987. (B. Pet. A-1.) On March 18, 1988, approximately six months later, Coit's claim was retained for further review. (B. Pet. A-12, 13.) As of August 1, 1988, the date of filing this brief, no action of any kind has been taken on Coit's claim and FSLIC is under no obligation to act on the claim by any certain date. Thus, approximately 10 months has passed since the claim was originally filed, and the initial determination by FSLIC has not yet occurred. Moreover, since FSLIC is under no compulsion to act once a claim has been retained for further review, and since the Board under its regulations can take 6 months to dispose of any appeal (53 Fed. Reg. at 13111), Coit's claim has for all intents and purposes been assigned to a "black hole" from which it may never emerge.

[30] FSLIC contends that the nightmare experience of Mr. Hudspeth (and now Coit itself) is not typical of the administrative process, and, in an effort to make the process appear efficient, refers to statistics outside the record in this case regarding the disposition of creditor claims in the FirstSouth and Liberty Federal receiverships. (B.R. 14 and 36, n.27.) However, as the attached correspondence with the Solicitor General's office indicates, the data on FirstSouth is incomplete and the Liberty Federal statistics are not representative. (See Appendix to this Brief at A-1 through A-3 and A-10 through A-12, hereinafter "A...") Coit was refused access to statistics on other FSLIC receiverships that Coit believes would have shown that the administrative process is a place to bury claims, not to process them.

Even the limited data on FirstSouth and Liberty Federal that Coit was furnished however, is highly revealing. Of the 103 claims filed in the Liberty Federal receivership, 20 have been allowed, 9 have been allowed in part, 17 have been disallowed and 24 have been retained for further review. However, while the average dollar amount of each of the 20 claims that were granted was only $2,134 and the average dollar amount of each of the claims granted in part was $504, the average dollar amount of each claim that was disallowed was $833,310, and the average dollar amount of each claim retained for further review was $2,076,431 (A-6). Accordingly, it is absolutely clear that FSLIC is only allowing the small

The power to bury claims also gives FSLIC the power to coerce unfair and unwanted settlements. Delay is particularly prejudicial in the context of a receivership. If a claimant knows that FSLIC can retain his claims indefinitely, and that FSLIC may in the meantime deplete the receivership estate by making interim distributions to other claimants, he is likely to place little value on his right to ultimate determination of the validity of his claim in court, which may result in a worthless judgment. Under these circumstances the exhaustion requirement can be used to force settlements that would not be attainable if a claimant's access to the courts was unimpaired.

Finally, the exhaustion requirement gives FSLIC the opportunity to turn the claims procedure into an obstacle course designed to limit the scope of judicial relief.[31]

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claims (probably of trade creditors) and is systematically disallowing or burying the large ones.

The Solicitor General suggests that the claimants in *Morrison- Knudsen Co. v. CHG International, Inc.* achieved quick settlements in the administrative forum (B.R. 36, n.27), but there is nothing in this Court's record to support that. In fact, it is not even apparent whether the settlement of the claims occurred through the administrative track or through the parallel bankruptcy proceeding for CHG International. Nor is there any indication in this Court's docket how long such claims were pending in the administrative forum. They may have been left undecided for as long as two years. All this Court's records show is that an order was signed in the bankruptcy proceeding dismissing Gibralter's claims against FSLIC on March 7, 1988 (A-13 through A-16), the same day this Court granted Coit's petition for writ of certiorari. (J.A.50).

[31] *See* 53 Fed. Reg. 13111 (Failure to request Board review of the receiver's determination within 60 days, or to contest any part thereof, results in waiver of right to judicial review). *See also* 53 Fed. Reg. 13109 (Failure to request reconsideration of receiver's proposed findings of fact and conclusions of law may be deemed waiver of objection to receiver's findings); *Id.* (Claim may be disallowed as sanction for failure to provide receiver with requested discovery, legal memoranda, or sworn statements).

Because the interests of the Board and FSLIC are adverse to those of claimants, and because there is considerable potential for abuse of an exhaustion requirement in the context of a FSLIC receivership, a Congressional intention to impose such a requirement should not be implied absent more explicit evidence of legislative intent. Where the administrative agency has such a fundamental conflict of interest, Congress and not the Board should determine whether to require exhaustion, and if so, what the parameters of such a requirement should be.

B. A Mandatory Exhaustion Requirement Will Create Significant Inequities And Inefficiencies In The Resolution of Claims.

1. ***Claims/Counterclaims***

One of the strongest arguments against finding Congressional intent to require exhaustion of administrative remedies in the context of a FSLIC receivership concerns FSLIC's need to affirmatively pursue litigation of its own as part of the collection process, including litigation against the very persons who will also be claimants against the receivership estate. An orderly liquidation requires that these claims and counterclaims be resolved in the same proceeding. However, if persons having claims against the receivership estate are required to exhaust their administrative remedies while the receiver's claims against the claimant must be heard in court, the exhaustion requirement will cause claims and counterclaims arising out of the same transaction to be heard in different forums. Rather than facilitating an orderly liquidation, such a bifurcation of unitary claims in different forums is wasteful and inefficient.[32]

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[32] For example, if FSLIC sued Coit on its note, Coit would interpose its claims against FSLIC as a defense and offset, including its claim that the usurious interest renders the note and deed of trust unenforceable. If Coit were already litigating its claim in court *defensively*, there would be a wasteful duplication of time, effort and expense in requiring Coit to complete the claims process when asserting those same claims *offensively*.

Coit submits that FSLIC's scenario of a "litigation free" claims process is a fiction. The claims process cannot be isolated from the collection process. Because FSLIC must resort to the courts to collect the debts of the association, extensive litigation is unavoidable in liquidations. Indeed, the Solicitor General has admitted as much in his Petition filed with this Court in *FSLIC v. Ticktin*, No. 85-294, where he states: "There is a large volume of litigation commenced by the FSLIC as a result of recent failures of state-chartered FSLIC insured institutions . . . ." (Pet. at 9.)

The volume of litigation commenced by FSLIC for federally-chartered institutions is even larger. Accordingly, the real choice is not between litigation or administrative action; it is between litigation in a single forum or litigation and administrative proceedings in multiple forums. It is precisely because of the interconnected nature of claims and counterclaims inherent in the liquidation process that Congress has not provided for mandatory exhaustion of administrative remedies in connection with the liquidation of financial institutions.

2. ***Foreclosures***

Perhaps the most extreme application of the *Hudspeth* doctrine has occurred in connection with extra-judicial foreclosures. In such situations, FSLIC is the aggressor, and seeks through foreclosure to bring into the receivership estate property which is owned by third parties. In states such as Texas, FSLIC can foreclose on real property without judicial proceedings, and it is the owner of the property who must secure judicial assistance if he believes the foreclosure is wrongful.

FSLIC has gone so far as to assert that the courts under *Hudspeth* may not inquire into the propriety of such foreclosures, *see FSLIC v. Hall Whispertree Associates*, 653 F. Supp. 148 (N.D. Tex. 1986), and the Board has attempted in its new regulations to further insulate the receiver from judicial review by forcing property owners to petition the Board for expedited relief from such foreclosures before seeking protection from the courts.[33]

Coit finds no indication of any Congressional intent to require exhaustion of administrative remedies by persons who are defending their property against claims by the receiver.[34] Thus, exhaustion should have no application to that portion of Coit's claim which merely sought a declaratory judgment of the invalidity of the note and deed of trust,

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[33] *See* 53 Fed. Reg. 13111 ("A timely request filed with the Bank Board in accordance with these procedures is mandatory to obtain judicial review of the receiver's Determination."); *Id.* at 13112 ("Requests for Expedited Relief must be filed within 5 work days from the date of . . . threatened action . . .. A notice of foreclosure is 'threatened action' by the FSLIC as receiver.").

[34] *See* B. Pet. 18, n.16. FSLIC has even less of an interest in being free from judicial intervention where it is not administering assets owned by the insolvent institution, but attempting to enlarge the receivership estate by drawing into it property owned by others. (We note that the Solicitor General has not addressed the rationale for requiring exhaustion in these circumstances.) However, FSLIC has gone so far as to invoke *Hudspeth* to insulate itself from claims that it converted the property of another even when the receiver has no claim to that property. *See* Brief of Appellant, *Zohdi v. FSLIC*, No. 88-3119, U.S. Court of Appeals, Fifth Circuit, at 4-10 (FSLIC repudiated its agreement to pay rent for appliances and then refused to return the appliances to the owner. The owner was refused judicial relief under the *Hudspeth* doctrine, and then was denied relief by FSLIC in the administrative proceeding because the bar date had passed, even though the bar date had run before the lease agreement was repudiated.) Under these circumstances, *Hudspeth* becomes more of a sword than a shield and permits the receiver to take the property of others with impunity.

or to FSLIC's threatened foreclosure of Coit's property.[35] In these circumstances, there is no statutory authorization in HOLA or the NHA for the Board to prohibit a person threatened with foreclosure by FSLIC from seeking immediate judicial relief, nor can such an application of an exhaustion requirement be justified by FSLIC's alleged need for a centralized claims procedure.

Application of an exhaustion requirement in circumstances where FSLIC seeks to foreclose against a claimant's property also threatens a property owner's due process rights to a prior or immediately subsequent judicial hearing. *See Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).[36] Surely such an intention should not be attributed to Congress absent the most explicit statutory language, especially when it cannot be shown that the Board

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[35] If FSLIC had sought judicial foreclosure on Coit's property, or had filed suit against Coit for a deficiency judgment on the note, these same claims could have been raised as defenses thereto without exhaustion. Whether or not exhaustion is required should not depend upon who is first to file suit.

[36] FSLIC contends that the Board has provided avenues for expedited relief in the event that submission to the administrative claims process results in extraordinary hardship. B.R. 35, n.26. However, administrative relief before a self-interested administrative tribunal is not considered adequate relief even if a subsequent judicial proceeding with *de novo* review is available. *Ward v. Monroeville*, 409 U.S. 57, 61-2 (1972); *Gibson v. Berryhill*, 411 U.S. at 577. Such a procedure is also inadequate because the proceeding before the Board provides no right to present evidence. Finally, the Board's procedure for expedited relief provides a claimant significantly less protection than judicial review because it must be invoked within "five work days from the date of the notice . . . or threatened action." 53 Fed. Reg. 13112 (1988). This tiny window for administrative relief is nothing but a trap for the unwary, not an adequate substitute for immediate access to the courts. *See also* T. Pfeiler, 53 Legal Bulletin at 447, n.55.

has any particular expertise in the area of foreclosures not possessed by the courts.[37]

C. A Mandatory Exhaustion Requirement Will Be Disruptive of State Court Proceedings and Raises Serious Issues of Federalism and Comity.

Although 12 U.S.C. § 1730(k)(1) permits FSLIC to remove creditor actions involving federally-chartered institutions from state to federal court, it does not permit FSLIC to remove creditor actions involving state-chartered institutions to federal court. Furthermore, even in those cases in which FSLIC has a right of removal, it must file its petition for removal within 30 days of the order appointing it as receiver, or its petition for removal is untimely. *See* 28 U.S.C. § 1446(b). As a result of these limitations upon FSLIC's right of removal, a not insignificant number of suits brought by creditors remain in state court.[38]

If a mandatory claims process were imposed on claimants, the disruption of judicial proceedings would not be confined to the federal system, but would also affect proceedings in

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[37] FSLIC asserts that it has "special expertise" in areas including loan participation agreements, real estate transactions, and the issuance of securities. B.R. 34, n.23. This is nonsense. While FSLIC regulates entities which may engage in these transactions, it has no special expertise not possessed by the courts on the substantive law of real estate, lending, and securities transactions. Moreover, even if FSLIC has expertise in these areas, such expertise cannot possibly justify the present reach of the *Hudspeth* doctrine, which has been extended to cover such areas as antitrust, RICO, civil rights, usury and common law fraud as to which FSLIC has no expertise. *See* B. Pet. 40, n.33; *see also* T. Pfeiler, 53 Legal Bulletin 433 at (App. B)

[38] *See*, e.g., *Glen Ridge I Condominiums, Ltd. v. FSLIC*, 734 S.W.2d 374 (Tex. App. — Dallas 1986), *writ denied per curiam, FSLIC v. Glen Ridge I Condominiums, Ltd.*, 31 Tex. Sup. Ct. J. 294 (March 30, 1988); *Summertree Venture, III v. FSLIC*, 742 S.W.2d 446 (Tex. App. — Houston [14th Dist.] 1987, writ denied).

state courts. Congress clearly contemplated a role for the state courts in suits by creditors against insolvent state-chartered institutions, *see* 12 U.S.C. § 1730(k)(1), and there is no indication that Congress intended state courts to defer to a federal administrative proceeding. While Congress undoubtedly has the power to compel such deference by state courts, concerns of comity and federalism dictate that Congress' intention to invade an area traditionally left to the states should be unmistakable. As this Court stated in *Bowen v. American Hospital Association*, 476 U.S. 610, 106 S. Ct. 2101, 2122 (1986):

> [W]henever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.

In this case, not only will an exhaustion requirement which encompasses state law claims against state-chartered institutions affect an area traditionally left to state courts, it will also affect judicial proceedings expressly left to state courts. Yet there is nothing in the statutes which would indicate Congress' intent that state courts should defer to proceedings before FSLIC. Because "[t]here is no intimation that Congress intended to treat differently federally-chartered and state-chartered associations,"[39] and because FSLIC has admitted that it has no express statutory authority to require exhaustion, the only reasonable conclusion is that Congress never intended to impose an exhaustion requirement in suits involving creditor claims.[40]

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[39] *Morrison-Knudsen Co. v. CHG Int'l. Inc.*, 811 F2d 1209, 1221 (9th Cir. 1987), cert. pending sub nom. *FSLIC v. Stevenson Associates*, No. 87-451 (filed Sept. 17, 1987).

[40] A mandatory exhaustion requirement will also have the effect of turning the receiver's use of a bar date for filing claims into a means for

IV EVEN IF EXHAUSTION IS OTHERWISE REQUIRED, IT SHOULD NOT BE REQUIRED IN THIS CASE.

Even if this Court determines that an exhaustion requirement should be applied to creditor claims in general, exhaustion should not be required in this case.

First, there was no administrative remedy to exhaust at the time this case was initially filed in court on October 24, 1986 (J.A.24). At that time, FirstSouth was not in receivership; FSLIC's claim process therefore had no application to creditors of FirstSouth. Accordingly, any exhaustion requirement did not come into being until December 4, 1986, when the Board appointed FSLIC as receiver of FirstSouth (J.A.7).[41] Because Coit had no notice of any applicable administrative procedure at the time it filed suit, exhaustion should not be required. *Cf., Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 865 (5th Cir. 1975).

Secondly, exhaustion should not be required for Coit's claims because exhaustion would be futile. FSLIC has already indicated that it believes Coit's claims are barred by the *D'Oenche, Duhme* doctrine. (*See* Appellee's Brief in the Fifth Circuit at 37-38.) Furthermore, the size of Coit's claims, which exceed $100 million dollars, together with the fact that FSLIC is a competing creditor to FirstSouth's limited assets, make it highly unlikely that Coit's claims will be granted by the agency. Under such circumstances, exhaustion should not be required. *See Glover v. St. Louis & S.F. Ry.*,

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modifying state and federal statutes of limitations. *See* T. Pfeiler, 53 Legal Bulletin at 462, n.104. Yet, Congress has nowhere granted the Board the power to modify substantive law. This problem is avoided under the National Bank Act because the claims process is voluntary. *See Queenan v. Mays*, 90 F2d 525, 530-31 (10th Cir. 1937).

[41] Even then, however, no *published* exhaustion requirement existed. *See* T. Pfeiler, 53 Legal Bulletin at 461 and n.102.

393 U.S. 324, 330 (1969); *Western Int'l Hotels v. Tahoe Reg. Plan. Ag'cy*, 387 F. Supp. 429, 433 (D. Nev. 1975).

Finally, Coit's claims have already been pending before FSLIC for 10 months. Under the circumstances, exhaustion should be deemed to have occurred because FSLIC has had more than enough time to decide whether or not to pay Coit's claims. *See Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970). Any further delay will cause irreparable injury because the receivership estate is a wasting asset and delay may impair even the value of a favorable judgment.

CONCLUSION

For all the reasons stated, exhaustion of administrative remedies should not be required in this case. If the Board needs a mandatory claims process, it should secure appropriate legislation from Congress. Alternatively, even if exhaustion is required the Court should still reject the Board's rules and regulations because they were drafted under the erroneous assumption that FSLIC had adjudicatory power, and exceed the limited rationale for exhaustion advanced in this Court. Accordingly, if an exhaustion requirement is imposed, it should be fashioned by the Court, be of limited duration, and be in all respects commensurate with the limited objective of allowing FSLIC to decide whether or not to pay a claim.

Respectfully submitted,

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APPENDIX

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June 28, 1988

VIA FEDERAL EXPRESS
Mr. Charles Fried
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Re: *Coit Independence Joint Venture v. FSLIC*
U.S. Supreme Court
No. 87-996

Dear Mr. Fried:

In the Brief for the Respondent recently filed in the above-captioned case, a number of statements were made concerning the disposition of claims by FSLIC in the FirstSouth receivership and in the Liberty Federal S&L receivership. *See* Brief of Respondent at 14 and 36, n.27. However, no source material or other documentation was referenced in support of this statistical information, nor is it part of the record in this case.

Specifically, I am referring to the following statements in your Brief:

1. *Reference to FirstSouth receivership:*

"As of April 20, 1988, 1,773 creditor claims had been filed against the FirstSouth receivership. Approximately 400 of these claims were filed by shareholders who, in light of FirstSouth's insolvency, cannot reasonably expect to receive any proceeds of the final distribution. Of the remaining non-shareholder claims, 129 have been allowed fully, 21 have been allowed in part and disallowed in part, and 285 have been disallowed. Approximately 500 other claims have been referred to the receiver's counsel for legal advice. Thus far, only five requests have been filed seeking Bank Board review of the Special Representative's determination."

Brief for the Respondent at 14.

2. *Reference to Liberty Federal S&L receivership:*

"Hudspeth's situation is hardly typical of the administrative process. For example, of the 103 claims filed against the Liberty Federal S&L receivership, which had a claims deadline of December 10, 1987, 63 have already been resolved."

Brief for the Respondent at 36, n.27.

I am in the process of preparing a reply brief for Petitioner in the above-captioned case and cannot respond to these statistics unless furnished with the source material from which your information was derived. I am particularly interested in knowing such details as the dollar amount of the claims that were allowed as compared to the dollar amount of the claims that were disallowed or not acted upon. I would also like any information you have about the type of claims that were allowed, disallowed or remain unresolved. I would also like an aging schedule for all claims filed in the First-South and Liberty Federal receiverships that shows how long each claim has been pending before FSLIC, including the

claims on which FSLIC has not yet acted (*e.g.*, how many claims are more than 180 days old, 360 days old, etc.). In short, I believe statistics can be seriously misleading if all of the information concerning the character, amount and age of these claims is not made known to the court.

I therefore formally request that all data in your possession or in the possession of the Bank Board or FSLIC regarding the disposition of the claims that you make reference to in your Brief be furnished to me as expeditiously as possible so that I may analyze such data and make whatever reply seems appropriate.

Very truly yours,

/s/ ROBERT GOODFRIEND
Robert E. Goodfriend, P.C.

REG:tdf
cc: Jeffrey P. Minear

(Seal)

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

FEDERAL EXPRESS

July 12, 1988

Robert E. Goodfriend, P.C.
Akin, Gump, Strauss, Hauer & Feld
4100 First City Center
1700 Pacific Avenue
Dallas, Texas 75201-4618

Re: *Coit Independence Joint Venture* v. *FSLIC*
No. 87-996

Dear Mr. Goodfriend:

On June 28, 1988, you requested source information on the statistics cited in the government's brief concerning FSLIC disposition of claims in certain receiverships. In response, I have enclosed relevant pages of the most recent copies of FSLIC's claims data summaries. These summaries have been updated since the filing of the government's brief; hence, you will note some minor differences in the figures (*e.g.*, there have been 1781 claims filed against FirstSouth as of April 30, 1988, as compared to our citation of 1773 claims as of April 20, 1988). I hope this information is responsive to your request.

Sincerely,

/s/ JEFFREY P. MINEAR
Jeffrey P. Minear
Assistant to the
Solicitor General

Enclosures

SOUTHERN REGION

CLAIMS DATA TRACKING AND RETRIEVAL SYSTEM
MONTHLY SUMMARY REPORT
CLAIMS BY RECEIVER BY STATUS
MONTH ENDING APRIL 30, 1988

KEY:

ALL - ALLOWED IN FULL
DIS - DISALLOWED IN FULL
OUT - WITHDRAWN/SETTLED
PND - PENDING REVIEW
PRT - PARTIAL ALLOWANCE
RET - RETAINED FOR REVIEW

CLAIMS DATA TRACKING AND RETRIEVAL SYSTEM

MONTHLY SUMMARY REPORT — RECEIVERSHIP BY STATUS

ALL RECEIVERSHIP CLAIMS THROUGH APRIL 30, 1988

	Claimed Amount	Amount Allowed	Amount Disallowed	Claims Pending	Total Claims	Total Days
**RECEIVERSHIP: LIBERTY						
* STATUS: ALL						
* Subsubtotal * ..	42682.25	42682.25	0.00	0.00	20	721
* STATUS: DIS						
* Subsubtotal * ..	14166264.29	0.00	14166264.29	0.00	17	1577
* STATUS: OUT						
* Subsubtotal* ...	400540.00	0.00	0.00	400540.00	17	
* STATUS: PND						
* Subsubtotal * ..	1607755.69	0.00	0.00	1607755.69	16	
* STATUS: PRT						
* Subsubtotal * ..	4531.54	3760.79	770.75	0.00	9	588
* STATUS: RET						
* Subsubtotal * ..	49834345.21	0.00	0.00	*9834345.21	24	
Subtotal	66056118.98	46443.04	14167035.04	51842640.90	103	

LIBERTY FEDERAL SAVINGS & LOAN
Leesville, Louisiana

Date of Takeover: April 24, 1987

Bar Date: December 10, 1987

Total claims filed as of April 30, 1988: 103

Allowed	29
Disallowed	17
Withdrawn/Settled	17
Pending	40

Average number of days to resolve claim: 46.7 days*

* Does not include pending claims.

CENTRAL REGION

CLAIMS DATA TRACKING AND RETRIEVAL SYSTEM
MONTHLY SUMMARY REPORT
CLAIMS BY RECEIVER BY STATUS
MONTH ENDING APRIL 30, 1988

KEY:

ALL - ALLOWED IN FULL
DIS - DISALLOWED IN FULL
OUT - WITHDRAWN/SETTLED
PND - PENDING REVIEW
PRT - PARTIAL ALLOWANCE
RET - RETAINED FOR REVIEW

CLAIMS DATA TRACKING AND RETRIEVAL SYSTEM

MONTHLY SUMMARY REPORT — RECEIVERSHIP BY STATUS

ALL RECEIVERSHIP CLAIMS THROUGH APRIL 30, 1988

	Claimed Amount	Amount Allowed	Amount Disallowed	Claims Pending	Total Claims	Total Days
**RECEIVERSHIP: FIRSTSOUTH						
* STATUS: ALL						
* Subsubtotal *	244349.15	244349.15	0.00	0.00	130	26197
*						
STATUS: DIS						
* Subsubtotal *	5600578.93	0.00	5600578.93	0.00	292	5500
* STATUS: OUT						
* Subsubtotal *	24447624.24	0.00	0.00	24447624.24	433	
* STATUS: PND						
* Subsubtotal *	75588.10	0.00	0.00	75588.10	3	
* STATUS: PRT						
* Subsubtotal *	878726.94	820496.31	58230.63	0.00	21	262
* STATUS: RET						
* Subsubtotal *	670944262.13	0.00	0.00	670944262.13	902	
Subtotal....	702191129.49	1064845.46	5658809.56	695467474.47	1781	

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July 14, 1988

VIA FEDERAL EXPRESS

Hon. Charles Fried
Solicitor General
Attention: Jeffrey P. Minear
U.S. Department of Justice
Washington, D.C. 20530

Re: *Coit Independence Joint Venture v. FSLIC*
U.S. Supreme Court
No. 87-996

Dear Mr. Minear:

I am in receipt of your letter of July 12, 1988, furnishing me with information on the statistics cited in the Government's brief. I believe that one page of the information that you furnished to me from FSLIC's claim data summaries may have been inadvertently omitted. In connection with the Liberty receivership, you have furnished me two pages: (1) a status sheet on the claims filed, and (2) a page analyzing the average number of days to resolve a claim. However, with respect to the FirstSouth receivership, I have only received

the status sheet and have not received the sheet dealing with the average number of days for resolution of a claim. I would appreciate receiving the second page on the FirstSouth receivership so that I will have the same information with respect to both receiverships. Also, I would like to know if the average number of days to resolve a claim begins with the date a claim is received by FSLIC or if it runs from the bar date?

The information you sent me does not contain any analysis regarding the type of claims that have been submitted in the Liberty and FirstSouth receiverships, e.g., claims for breach of contract, tort, antitrust, usury, etc. Is there any information of this character?

I would like to know if you can furnish me with claims data summaries with respect to any other savings and loan associations, particularly those that became insolvent in late 1985 or early 1986. I notice that the Liberty Federal example which you have used had a bar date of December 10, 1987, and involves only 103 claimants. Please advise whether you can furnish me with statistics on savings and loan associations with earlier bar dates and with a larger universe of claimants.

I would also appreciate an explanation of how the category "total days" is calculated. For example, under FirstSouth the 130 claims allowed in full has the figure 26,197 under the category total days. Is this figure arrived at by adding together the total number of days for each of the 130 claims in this category from the date each claim was received, or the bar date, until the claim was allowed?

I would like to request clarification of several of the categories utilized in these reports. Please advise concerning the difference between "PND" (pending review) and "RET" (retained for review). I am assuming that retained for review is the result of action by FSLIC when they retain a claim for

further study. Does pending review have reference to claims that are pending before the Board? Please advise if my understanding of these categories is correct or if they have some other meaning that I have missed.

Finally, do you have any information on how long the claims retained for review have been pending? I notice that the figures for average number of days to resolve claims "does not include pending claims." It is this category of pending claims about which I am inquiring. Furthermore, I notice that the aging sheet contains only an average number of days for the resolution of claims that have been acted upon. Do you have any statistics reflecting the time required to act upon the last claim disposed of in each category (allowed, disallowed, withdrawn/settled)?

Thank you for sending me the claims data summaries. I would greatly appreciate your reply to these inquiries as soon as possible.

Very truly yours,

/s/ ROBERT E. GOODFRIEND
Robert E. Goodfriend, P.C.

REG:tdf

CARY & BARON
2205 Pacific Building
720 Third Avenue
Seattle, Washington 98104

March 10, 1988

Mr. Joseph F. Spaniol, Jr.
Clerk Supreme Court
of the United States
Office of the Clerk
One 1st NE
First N.E.
Washington, D.C. 20543

RE: *Federal Savings & Loan Insurance Corporation v. Stevenson Associates, et al*
No. 87-451

Dear Mr. Spaniol:

Enclosed please find a copy of an order signed on March 7, 1988 by the Honorable William L. Dwyer, Judge, United States District Court for the Western District of Washington at Seattle dismissing Gibraltar Savings & Loan Association's ("gibraltar") claims against the Federal Savings & Loan Insurance Corporation ("FSLIC") as receiver for Westside Federal Savings & Loan Insurance Corporation ("Westside") in *Rembold v. Gibraltar Savings & Loan Association*, No. C84-1644V (W.D. Wash.). As you know, in *Morrison-Knudsen Co., Inc. v. CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1987), Gibraltar successfully appealed the district court's decision in *Rembold* (reported at 624 F.Supp. 1006) dismissing Gibraltar's claims against FSLIC. That case is now on appeal by FSLIC to this court under the caption *FSLIC v. Stevens & Associates, et al*, No. 87-451. This is to advise you that

Gibraltar has settled its claims against FSLIC as receiver for Westside and, per the enclosed order of dismissal, Gibraltar's claims against FSLIC are no longer at issue.

If you have any questions, please contact me.

Sincerely,

CARY & BARON,

/s/ SCOTT G. WARNER

Scott G. Warner

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WAYNE C. REMBOLD *Plaintiff,* v. GIBRALTAR SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association; and QUEEN CITY INC., a Washington corporation *Defendants, Counter-claimants and Cross-claimants,* v. WESTSIDE FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association, *Additional Counterclaim and Cross-Claim Defendants,* v. REMBOLD CORPORATION, an Oregon corporation, *Third-Party Defendant.*	NO. C84-1644V ORDER DISMISSING CLAIMS WITHOUT PREJUDICE
GIBRALTAR SAVINGS & LOAN ASSOCIATION and QUEEN CITY, INC., *Cross-Claimants,* v. WAYNE C. REMBOLD and KAREN REMBOLD as the spouse of Wayne C. Rembold, and their marital community; DAN WILLIAMSON and JANE DOE WILLIAMSON, as his spouse, and their marital community; SCOTT FRASER and JANE DOE FRASER, as his spouse, and their marital community; FRED ING and JANE DOE ING, as his spouse, and their marital community; WILLIAM D. SMITH and JANE DOE SMITH, as his spouse, and their marital community; MT. BALDY INVESTMENTS, an Oregon general partnership; and HGW, INC., an Oregon corporation, *Additional Counterclaim and Cross-Claim Defendants.*	

THIS MATTER, having come before the court on the joint motion of Gibraltar Savings of Washington, F.A. and Queen City, Inc. (collectively "Gibraltar") and the Federal Savings and Loan Insurance Corporation as Receiver for Westside Federal Savings and Loan Association ("FSLIC as Receiver"), NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the claims of Gibraltar against FSLIC as Receiver be and hereby are dismissed without prejudice and without cost to any party.

DATED this 7th day of March, 1988.

/s/ William L. Dwyer
Judge William L. Dwyer

Presented by:

CARY & BARON

By /s/ Scott Warner
David Lieberworth
Scott G. Warner
Attorneys for Gibraltar
Savings of Washington
F.A. and Queen City, Inc.

PERKINS COIE

By /s/ John D. Alkire
John D. Alkire
Attorneys for FSLIC as
Receiver

G/PD800385